Supreme Court, U.S.
FILED

10-572 OCT 28 2010

OFFICE OF THE CLERK

No.

# In the Supreme Court of the United States

THE REPUBLIC OF ARGENTINA,
BANCO DE LA NACIÓN ARGENTINA,
*Petitioners,*

v.

EM LTD., NML CAPITAL, LTD.,
*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## PETITION FOR WRIT OF CERTIORARI

MARK S. SULLIVAN
MARIO DIAZ-CRUZ, III
LAURA M. LESTRADE
DORSEY & WHITNEY LLP
250 Park Avenue
New York, New York 10177
(212) 415-9200
sullivan.mark@dorsey.com
diaz.cruz.mario@dorsey.com
lestrade.laura@dorsey.com

*Attorneys for Petitioner Banco de la Nación Argentina*

JONATHAN I. BLACKMAN
*Counsel of Record*
CARMINE D. BOCCUZZI
CHRISTOPHER P. MOORE
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2000
jblackman@cgsh.com
cboccuzzi@cgsh.com
cmoore@cgsh.com

*Attorneys for Petitioner The Republic of Argentina*

October 28, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

## QUESTION PRESENTED

Whether in cases where jurisdiction is predicated on the Foreign Sovereign Immunities Act of 1976 ("FSIA"), federal courts should apply federal common law choice of law rules, as held repeatedly by the Ninth Circuit, or the forum state's choice of law rules, as repeatedly held by the Second Circuit, including in this case, and by other circuits?

## LIST OF PARTIES

The petitioners in this case are the Republic of Argentina (Defendant-Appellant below) and Banco de la Nación Argentina (Interested Non-Party-Appellant below). The respondents are EM Ltd. and NML Capital, Ltd. (Plaintiff-Appellees below).

## TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

LIST OF PARTIES ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... v

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

STATUTORY PROVISION INVOLVED ..... 1

STATEMENT OF THE CASE ..... 1

A. Background ..... 3

B. The Public Trusts and the BH Trust ..... 5

C. Respondents EM Ltd. ("EM") and NML Capital, Ltd. ("NML") ..... 6

D. The District Court Authorizes EM/NML to Attach the BH Trust's ADSs and the Republic's Purported Beneficial Interest, and the Court of Appeals Affirms ..... 11

REASONS FOR GRANTING THE PETITION .. 13

I. THIS CASE SQUARELY PRESENTS AN ISSUE OVER WHICH THE COURTS OF APPEALS ARE DIVIDED: WHETHER THE

FSIA REQUIRES FEDERAL COMMON LAW OR FORUM CHOICE OF LAW RULES. . . . . 13

CONCLUSION . . . . . 18

APPENDIX

Appendix A: Summary Order, United States Court of Appeals for the Second Circuit (August 3, 2010) . . . . . 1a

Appendix B: Opinion, United States District Court for the Southern District of New York (August 18, 2009) . . . . . 14a

Appendix C: Statute 28 U.S.C. § 1610(a) & (d) . . 33a

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

*Aerolinas Argentinas v. NML Capital, Ltd.*,
Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Dec. 1, 2009 (Fr.) . . . . . 10

*Atherton v. FDIC*,
519 U.S. 213 (1997) . . . . . 17

*Aurelius Capital Partners, LP v. Republic of Argentina*,
584 F.3d 120 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 1691 (2010) . . . . . 9

*Banco Nacional de Cuba v. Sabbatino*,
376 U.S. 398 (1964) . . . . . 16, 17, 18

*Barkanic v. Gen. Admin. of Civil Aviation of the People's Republic of China*,
923 F.2d 957 (2d Cir. 1991) . . . . . 2, 13

*Brink's Ltd. v. S. African Airways*,
93 F.3d 1022 (2d Cir. 1996) . . . . . 13

*CIBC Bank & Trust Co. (Cayman) Ltd. v. Banco Central do Brasil*,
886 F. Supp. 1105 (S.D.N.Y. 1995) . . . . . 7

*Chuidian v. Philippine Nat'l Bank*,
976 F.2d 561 (9th Cir. 1992) . . . . . 13

*Dammarell v. Islamic Republic of Iran*,
No.Civ.A. 01-2224JDB, 2005 WL 756090
(D.D.C. Mar. 29, 2005) . . . . . 14

*Dumont v. Saskatchewan Gov't Ins. (SGI)*,
258 F.3d 880 (8th Cir. 2001) . . . . . 3

*Elliott Assocs. L.P. v. Banco de la Nacion*,
Cour d' Appel [CA] [Court of Appeals] Bruxelles,
8e ch., Sept. 26, 2000 (Belg.) . . . . . 8

*EM Ltd. v. Republic of Argentina*,
131 F. App'x 745 (2d Cir. 2005) . . . . . 9, 10

*First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*,
462 U.S. 611 (1983) . . . . . 14, 16, 17

*H.W. Urban GmbH v. Republic of Argentina*,
No. 02 Civ. 5699 (TPG), 2003 WL 21058254
(S.D.N.Y. May 12, 2003) . . . . . 11

*In re Aircrash Disaster Near Roselawn, Ind. on Oct. 31, 1994*,
926 F. Supp. 736 (N.D. Ill. 1996) . . . . . 14

*In re Tex. E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*,
870 F. Supp. 1293 (E.D. Pa. 1992) . . . . . 14

*Liu v. Republic of China*,
892 F.2d 1419 (9th Cir. 1989) . . . . . 2, 13

*NML Capital, Ltd. v. Republic of Argentina*,
Cour d' appel [CA] [regional court of appeal]
Paris, 8e ch., Oct. 1, 2009 (Fr.) . . . . . 10

*NML Capital, Ltd. v. Republic of Argentina*,
No. 04-cv-00197-CKK (D.D.C. Aug. 3, 2005) 10

*NML Capital, Ltd. v. Republic of Argentina*,
No. 02 Civ. 3804 (TPG), 2005 WL 743086
(S.D.N.Y. Mar. 31, 2005), *aff'd sub nom.*, *EM Ltd. v. Republic of Argentina*, 131 F. App'x 745
(2d Cir. 2005) ..... 9, 10

*O'Bryan v. Holy See*,
556 F.3d 361 (6th Cir. 2009) ..... 13

*Oveissi v. Islamic Republic of Iran*,
573 F.3d 835 (D.C. Cir. 2009) ..... 13

*NML Capital, Ltd. v. Republic of Argentina*,
No. 02 Civ. 3804 (TPG), 2005 WL 743086
(S.D.N.Y. Mar. 31, 2005) ..... 9

*Pescatore v. Pan Am. World Airways, Inc.*,
97 F.3d 1 (2d Cir. 1996) ..... 14

*Pravin Banker Assocs., Ltd. v. Banco Popular del Peru*,
109 F.3d 850 (2d Cir. 1997) ..... 11

*Republic of Argentina v. NML Capital, Ltd.*,
Tribunal de Première Instance [Civ.] [Tribunal of First Instance] Bruxelles, Nov. 12, 2009
(Belg.) ..... 10

*Republic of Nicaragua v. LNC Invs. LLC*,
Cour d' Appel [CA] [Court of Appeal] Bruxelles,
9e ch., Mar. 19, 2004 (Belg.) ..... 8

*Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777 (9th Cir. 1991) ..... 13

*Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001) ..... 18

*Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) ..... 17

**Statutes**

28 U.S.C. § 1254(1) ..... 1

28 U.S.C. § 1606 ..... 16

28 U.S.C. § 1610(a) ..... 1, 2

28 U.S.C. § 1610(d) ..... 1, 2

**Other Authorities**

Amicus Curiae of the Federal Reserve Bank of New York, *Macrotecnic Int'l Corp. v. Republic of Argentina*, No. 02 Civ. 5932 (TPG) (S.D.N.Y filed Jan. 12, 2004) ..... 9

Amicus Curiae of the Clearing House Association, *Macrotecnic Int'l Corp. v. Republic of Argentina*, No. 02 Civ. 5932 (TPG) (S.D.N.Y filed Jan. 12, 2004) ..... 9

Paul Blustein, AND THE MONEY KEPT ROLLING IN (AND OUT): WALL STREET, THE IMF, AND THE BANKRUPTING OF ARGENTINA (2005) ..... 4

Ross P. Buckley, *The Bankruptcy of Nations: An Idea Whose Time Has Come*, 43 INT'L LAW. 1189 (2009) . . . . . 4

Jerry R. Dagrella, Note, *Wealthy Americans Planning to Renounce Their Citizenship to Save on Taxes Have a New Problem to Consider: This Time Congress Means Business*, 13 TRANSNAT'L LAW. 363 (2000) . . . . . 8

G. Mitu Gulati & Kenneth N. Klee, *Sovereign Piracy*, 56 BUS. LAW. 635 (ABA Publ'ns Feb. 2001) . . . . . 8

H.R. Rep. No. 94-1487, at 13, 32 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611, 6631, 6632 . . . . . 14

Jonathan C. Lippert, Note, *Vulture Funds: The Reason Why Congolese Debt May Force a Revision of the Foreign Sovereign Immunities Act*, 21 N.Y. INT'L L. REV. 1 (2008) . . . . . 7

*NML Capital, Ltd. v. Republic of Argentina*, No. 09-1708 (TPG) (S.D.N.Y. compl. filed Feb. 24, 2009) . . . . . 9

Panel of Independent Advisors, *Economic and Financial Issues Facing Argentina*, IMF News Brief No. 02/80, July 29, 2002, ¶ 1, *available at* http://www.imf.org/external/np/sec/nb/2002/nb0280.htm (last visited Oct. 26, 2010) . . 5

Press Release, Office of the High Commissioner for Human Rights, *'Vulture Funds' – UN expert on foreign debt welcomes landmark law to address*

*profiteering* (Apr. 20, 2010), *available at* http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9976&LangID=E (last visited Oct. 26, 2010) . . . . . 7

Carmen M. Reinhart & Kenneth S. Rogoff, *This Time is Different: A Panoramic View of Eight Centuries of Financial Crises* (2008), *available at* http://www.economics.harvard.edu/files/faculty/51_This_Time_Is_Different.pdf (last visited Oct. 26, 2010) . . . . . 4

Restatement (Second) of Conflict of Laws § 268 . . . . . 2, 15, 18

Statement of Interest of the United States, *Macrotecnic Int'l Corp. v. Republic of Argentina*, No. 02 Civ. 5932 (TPG) (S.D.N.Y filed Jan. 13, 2004) . . . . . 9, 11

Carlos G. Fernández Valdovinos, *Growth, Poverty, and Social Equity in Argentina*, World Bank Newsletter, No. 82, November 2005, *available at* http://siteresources.worldbank.org/INTENBREVE/Newsletters/20847679/82-NOV05-AR_Growth.pdf (last visited Oct. 26, 2010) . . . . . 4

World Bank, ARGENTINA: FROM INSOLVENCY TO GROWTH (1993) . . . . . 3

14A Charles Alan Wright & Arthur R. Miller, *Federal Prac. & Proc.* § 3662 (3d ed. 1998) . . . . 3

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

The Republic of Argentina (the "Republic") and Banco de la Nación Argentina ("BNA") respectfully pray that this Court grant a writ of certiorari to the United States Court of Appeals for the Second Circuit.

## OPINIONS BELOW

The summary order of the court of appeals (App. at 1a) is published at 2010 WL 3001777 (2d Cir. Aug. 3, 2010). The slip opinion of the district court (App. at 14a) is published at 2009 WL 2568433 (S.D.N.Y. Aug. 18, 2009).

## JURISDICTION

The judgment of the court of appeals was entered on August 3, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

The relevant statutory provision, 28 U.S.C. § 1610(a) & (d), is set forth at App. at 33a.

## STATEMENT OF THE CASE

The instant case arises under the FSIA and concerns execution upon the assets of an Argentine trust (the "BH Trust"), which was created under Argentine law and settled in Argentina exclusively among Argentine parties. Plaintiffs, who sought and

obtained the orders in aid of execution, are *not* creditors of the Trust, but judgment creditors of the Republic who refused to participate in the Republic's global debt restructuring process. Plaintiffs argued that the BH Trust, whose corpus is comprised principally of certain American Depository Shares (the "ADSs"), could be disregarded and its assets deemed attachable property of the Republic "in the United States" being "used for a commercial activity in the United States." 28 U.S.C. § 1610(a) & (d). The court of appeals' acceptance of plaintiffs' position included the court's application of both New York choice of law rules and New York substantive law to disregard the BH Trust, notwithstanding that jurisdiction over the action was based upon the federal FSIA and the trust itself explicitly provides that it is governed by Argentine law. By resorting to the forum state's choice of law rules – as opposed to applying federal common law choice of law principles – the decision below exacerbated a preexisting and recurring split among the circuits on this issue under the FSIA. *Compare, e.g.*, App. 7a (quoting *Barkanic v. Gen. Admin. of Civil Aviation of the People's Republic of China*, 923 F.2d 957, 959 (2d Cir. 1991) ("[T]he FSIA implicitly requires courts to apply the choice of law provisions of the *forum state* with respect to all issues governed by state substantive law.") (emphasis added)), *with Liu v. Republic of China*, 892 F.2d 1419, 1426 (9th Cir. 1989) ("*federal* common law provide[s] the appropriate choice of law rule in cases arising under the FSIA") (emphasis added).

Under federal common law choice of law principles, a trust instrument is "construed in accordance with the rules of construction of the state designated for this purpose in the instrument." Restatement (Second)

of Conflict of Laws § 268. There was and can be no dispute that the BH Trust is a valid trust as a matter of Argentine law. App. 8a. Thus, had the court of appeals applied this federal choice of law rule and hence Argentine substantive law – *viz.*, the law designated in the underlying trust instrument – the court could not have disregarded the BH Trust. However, rather than applying Argentine law to the BH Trust, as envisaged under both the federal choice of law rules and the underlying trust instrument, the court of appeals compounded a multi-circuit split by looking to New York choice of law principles and applying New York's "public policy" exception to respecting the trust form. *Id. See generally Dumont v. Saskatchewan Gov't Ins. (SGI)*, 258 F.3d 880, 886 (8th Cir. 2001) ("In a FSIA case, 'there is no clear understanding as to whether the forum state's choice-of-law rules should apply or whether federal common law should govern'") (quoting 14A Charles Alan Wright & Arthur R. Miller, *Federal Prac. & Proc.* § 3662 (3d ed. 1998)). The uncertainty created by this circuit split on an important and recurring question of federal law is long overdue for settlement by this Court.

### A. Background

The present case arises from the Republic's issuance of global bonds during the 1990s (the "Bonds"), when the Republic "enacted a series of structural reforms" that successfully "recast the basis of public finance" and were widely praised as a model for free market reforms in developing countries. World Bank, ARGENTINA: FROM INSOLVENCY TO GROWTH 12 (1993). Following the international financial crisis of 1998, however, the Republic fell into a deep recession and experienced the worst economic catastrophe of its

modern history. *See generally* Paul Blustein, AND THE MONEY KEPT ROLLING IN (AND OUT): WALL STREET, THE IMF, AND THE BANKRUPTING OF ARGENTINA (2005). "The dramatic economic collapse in Argentina, culminating in 2002, resulted in the deepest political and economic crisis in generations. Few countries have experienced such economically catastrophic events."[1] By the end of 2001, this crisis made it impossible for the Republic to service its overwhelming debt burden – some $80 billion in public external debt alone – while maintaining basic governmental services necessary for the health, welfare, and safety of the Argentine people.[2] "[U]nable to service its debt," the Republic was forced to defer interest and principal payments to its bondholders, and seek a voluntary restructuring of

---

[1] Carlos G. Fernández Valdovinos, *Growth, Poverty, and Social Equity in Argentina*, World Bank Newsletter, No. 82, November 2005, at 1, *available at* http://siteresources.worldbank.org/INTENBREVE/Newsletters/20847679/82-NOV05-AR_Growth.pdf (last visited Oct. 26, 2010). The Argentine crisis has been described as the "worst-case scenario" in eight centuries of financial crises throughout the world. *See* Carmen M. Reinhart & Kenneth S. Rogoff, *This Time is Different: A Panoramic View of Eight Centuries of Financial Crises* (2008), *available at* http://www.economics.harvard.edu/files/faculty/51_This_Time_Is_Different.pdf (last visited Oct. 26, 2010).

[2] *See, e.g.*, Ross P. Buckley, *The Bankruptcy of Nations: An Idea Whose Time Has Come*, 43 INT'L LAW. 1189, 1196 (2009) (describing Argentina's economic crisis: "The living standards of over one-half of the Argentine people fell below the poverty line, and over a third could not afford basic food. Children were fainting in class from hunger, regularly. Adults were rioting and breaking into supermarkets, regularly, in search of food. UNICEF Argentina was concerned that stunted growth and reduced mental capacities would be the long-term consequence of this economic crisis for millions of the nation's children.").

its crippling debt burden. Panel of Independent Advisors, *Economic and Financial Issues Facing Argentina*, IMF News Brief No. 02/80, July 29, 2002, ¶ 1, *available at* http://www.imf.org/external/np/sec/nb/2002/nb0280.htm (last visited Oct. 26, 2010).

**B. The Public Trusts and the BH Trust**

Long before the Republic defaulted on the Bonds that are the subject of the underlying actions by the plaintiffs against the Republic, the Argentine Congress as part of a program of free market reforms implemented a plan to privatize a state-owned bank, Banco Hipotecario Nacional, by organizing a stock company, Banco Hipotecario S.A. Shares of Banco Hipotecario S.A. were sold to the public and the proceeds used to finance public works projects in Argentina. As part of this plan, the Argentine Congress passed Law No. 24,855 in July 1997 creating the "Infrastructure Trust" as a public trust to evaluate and fund proposed public infrastructure projects. In September 1997, Decree No. 924/97 was enacted, creating a second public trust, the "Assistance Trust," to assist in the capitalization of the Infrastructure Trust so that the Infrastructure Trust would have the necessary funding to finance the projects. (The Assistance Trust, together with the Infrastructure Trust, are collectively referred to as the "Public Trusts.") BNA, a state-owned Argentine commercial bank and an interested non-party appellant below, was designated trustee of both Public Trusts.

After creating the Public Trusts, the Argentine government promulgated a decree in 1998 pursuant to which Banco Hipotecario S.A. established the BH Trust, an Argentine trust, to acquire and hold Class D

shares of Banco Hipotecario S.A. in the form of ADSs. The trust agreement creating the BH Trust was executed in February 1999 among an Argentine trustor, Banco Hipotecario S.A.; an Argentine trustee, First Trust of New York, National Association, Argentine Permanent Representation (the "Argentine Trustee"); and BNA in its capacity as trustee of the Assistance Trust and Infrastructure Trust, which are respectively the beneficiary and residual beneficiary of the BH Trust. The trust agreement provides that Argentine law governs the BH Trust.

The corpus of the BH Trust consists mainly of the ADSs, which belong to the Argentine Trustee on behalf of the BH Trust. In connection with attachment orders obtained by plaintiffs in May 2007, U.S. Bank Trust provided a garnishee's statement in which it identified a New York securities account containing 9,090,500 ADSs, each ADS representing ten Class D shares of Banco Hipotecario, S.A.[3] The ADSs "corresponded to unexercised options," App. 17a, and had been sitting, unused, for more than three years when the district court issued the May 2007 attachment orders.

### C. Respondents EM Ltd. ("EM") and NML Capital, Ltd. ("NML")

Plaintiffs EM and NML are "vulture funds," distressed debt buyers that acquired beneficial interests in the Bonds at a deep discount both

---

[3] First Trust of New York National Association changed its name to U.S. Bank Trust National Association in 1998, but at all times relevant here it has operated in Argentina under the name First Trust of New York National Association, Argentine Permanent Representation.

immediately before, and well after, the Republic suspended payments on its unsustainable external debt in December 2001. EM/NML and similar hedge funds seek to take advantage of the absence of bankruptcy protection in the sovereign context to bring lawsuits for the face value of defaulted sovereign debt, obtain judgments on which interest continues to run indefinitely and then try to execute on them.[4]

EM is a Cayman Islands corporation wholly owned by Dart Capital Ltd., which is in turn controlled by Kenneth Dart, a former U.S. citizen who was behind litigation that tried to interfere with Brazil's restructuring in the 1990s. *See CIBC Bank & Trust Co. (Cayman) Ltd. v. Banco Central do Brasil*, 886 F.

---

[4] *See, e.g.*, Press Release, Office of the High Commissioner for Human Rights, *'Vulture Funds' – UN expert on foreign debt welcomes landmark law to address profiteering* (Apr. 20, 2010), *available at* http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9976&LangID=E (last visited Oct. 26, 2010) ("'[T]he profiteering of 'vulture funds' [has been] at the expense of both the citizens of distressed debtor countries and the taxpayers of countries that have supported international debt relief efforts . . . . 'Vulture funds' have exploited the voluntary nature of international debt relief schemes by acquiring defaulted sovereign debt at deeply discounted prices and then seeking repayment of the full value of the debt through litigation, seizure of assets or political pressure.'") (citation omitted); Jonathan C. Lippert, Note, *Vulture Funds: The Reason Why Congolese Debt May Force a Revision of the Foreign Sovereign Immunities Act*, 21 N.Y. INT'L L. REV. 1, 2, 27 (2008) (vulture funds seek "extraordinary profits at the expense of U.S. companies, the U.S. economy and U.S. foreign relations . . . potentially affecting debt restructuring in all emerging markets").

Supp. 1105, 1107-08 (S.D.N.Y. 1995).[5] NML, also a Cayman Islands corporation, is wholly owned by Elliott International, L.P., whose general partner is an affiliate of Elliott Associates, L.P. ("Elliott Associates"). Elliott Associates is well-known in the world of sovereign debt for its surprise attack on Peru's debt restructuring in 2000, when it obtained an *ex parte* order from a Brussels court enjoining Peru from making payments to other creditors under its Brady Plan debt restructuring based upon a novel and unprecedented interpretation under New York law of the boilerplate "*pari passu* clause." *See Elliott Assocs. L.P. v. Banco de la Nacion*, Cour d' Appel [CA] [Court of Appeals] Bruxelles, 8e ch., Sept. 26, 2000 (Belg.). Rather than risk falling into default on its new indebtedness, Peru settled with Elliott Associates, allowing it to reap enormous profits on the discounted debt it had purchased. *See* G. Mitu Gulati & Kenneth N. Klee, *Sovereign Piracy*, 56 BUS. LAW. 635, 636 (ABA Publ'ns Feb. 2001).[6]

---

[5] Mr. Dart reportedly relinquished his U.S. citizenship for tax purposes, and is now a citizen of Belize and Ireland. *See* Jerry R. Dagrella, Note, *Wealthy Americans Planning to Renounce Their Citizenship to Save on Taxes Have a New Problem to Consider: This Time Congress Means Business*, 13 TRANSNAT'L LAW. 363, 364 (2000).

[6] In litigated proceedings involving another sovereign, Nicaragua, the Belgian courts subsequently denied the same type of order that Elliott Associates had earlier obtained *ex parte*. *Republic of Nicaragua v. LNC Invs. LLC*, Cour d' Appel [CA] [Court of Appeal] Bruxelles, 9e ch., Mar. 19, 2004, (Belg.). The United States, the Federal Reserve Bank of New York and The Clearing House Association LLC all submitted statements of interest or amicus briefs in earlier proceedings in the district court also rejecting Elliott Associates' erroneous view of the *pari passu* clause. *See*

EM and NML have used similar aggressive tactics in the case of Argentina. EM's parent acquired beneficial interests in the Bonds on November 21 and December 5, 2001, when those instruments were trading at a deep discount because of the general expectation that the Republic would be unable to service its debt as scheduled. NML, for its part, bought interests in Republic debt both immediately before and after the Republic's default. NML continues to speculate in Republic nonperforming debt, most recently allegedly purchasing more than $100 million of defaulted Bond interests in late 2008 and filing a new complaint against the Republic in February 2009. *See NML Capital, Ltd. v. Republic of Argentina*, No. 09-1708 (TPG) (S.D.N.Y. compl. filed Feb. 24, 2009).

Besides launching a series of execution attempts against purported property of the Republic that the federal courts have overwhelmingly rejected as violative of the FSIA,[7] these plaintiffs also sought to

---

Amici Curiae of the Federal Reserve Bank of New York and the Clearing House Association, *Macrotecnic Int'l Corp. v. Republic of Argentina*, No. 02 Civ. 5932 (TPG) (S.D.N.Y filed Jan. 12, 2004) and Statement of Interest of the United States, *id.* (filed Jan. 13, 2004).

[7] *See Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 124, 130-31 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 1691 (2010) (rejecting attempt by EM/NML and other vulture funds to execute upon Argentine social security funds because the Republic had not "used [the funds] for a commercial activity in the United States") (citing *EM I*, 473 F.3d at 481 n.19); *NML Capital, Ltd. v. Republic of Argentina*, No. 02 Civ. 3804 (TPG), 2005 WL 743086, at *3 (S.D.N.Y. Mar. 31, 2005) (vacating EM/NML's *ex parte* restraining and attachment orders concerning Bonds tendered by third parties in the Republic's 2005 exchange offer), *aff'd sub*

impede the Republic's debt restructuring efforts with its creditors: in March 2005, EM and NML tried to disrupt the settlement of the Republic's global exchange offer to creditors by attaching and restraining – again on an *ex parte* basis – nonperforming Bonds that had been tendered by their beneficial owners for new security entitlements. The district court granted the Republic's motion to vacate the *ex parte* attachment and restraining orders, and the Second Circuit affirmed the vacatur. *See EM Ltd. v. Republic of Argentina*, 131 F. App'x 745, 747 (2d Cir. 2005). The Republic's 2005 exchange offer was then able to proceed to settlement, as was the Republic's later 2010 exchange offer, resulting in the successful restructuring of 91% of the Republic's nonperforming

---

*nom.*, *EM Ltd. v. Republic of Argentina*, 131 F. App'x 745 (2d Cir. 2005); *NML Capital, Ltd. v. Republic of Argentina*, No. 04-cv-00197-CKK (D.D.C. Aug. 3, 2005) (vacating NML's *ex parte* attachments of diplomatic and military property in Washington, D.C. and Maryland). Courts outside of the United States have likewise rejected EM/NML's unlawful efforts to interfere with purported property of the Republic within their respective foreign jurisdictions. *See, e.g.*, *NML Capital, Ltd. v. Republic of Argentina*, Cour d' appel [CA] [regional court of appeal] Paris, 8e ch., Oct. 1, 2009 (Fr.) (affirming vacatur of attachments of bank accounts related to the Argentine Embassy in Paris because funds were immune diplomatic property); *Republic of Argentina v. NML Capital, Ltd.*, Tribunal de Première Instance [Civ.] [Tribunal of First Instance] Bruxelles, Nov. 12, 2009 (Belg.) (vacating attachments related to accounts of Argentine Embassy in Belgium); *Aerolinas Argentinas v. NML Capital, Ltd.*, Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Dec. 1, 2009 (Fr.) (lifting attachments on Argentine state-owned airline because airline was not an "émanation" of the state that was liable for the state's debts).

debt.[8] EM/NML declined to participate in the restructuring process – the offer was equally available to them as to the Republic's other creditors – and continue aggressively to pursue litigation against the Republic and attempts to execute against purported Republic property.

### D. The District Court Authorizes EM/NML to Attach the BH Trust's ADSs and the Republic's Purported Beneficial Interest, and the Court of Appeals Affirms

In May 2007, EM/NML sought and obtained *ex parte* attachment and restraining orders against the ADSs held by the BH Trust and the Republic's purported "beneficial interest" in the trust assets. In its August 18, 2009 opinion confirming those orders, the district court did not address the status of the BH Trust, but rather focused exclusively on whether the Republic had some attachable "beneficial interest" in the BH Trust vis-à-vis the Public Trusts. App. 31a-32a. There was no finding by the district court that the BH Trust was invalid under Argentine law, New York law

---

[8] The United States, the international financial community and the federal courts have recognized the importance of voluntary sovereign debt restructuring. *See* Statement of Interest of the United States, *Macrotecnic Int'l Corp. v. Republic of Argentina*, No. 02 Civ. 5932 (TPG), at 2-6 (S.D.N.Y. filed Jan. 13, 2004); *H.W. Urban GmbH v. Republic of Argentina*, No. 02 Civ. 5699 (TPG), 2003 WL 21058254, at *2 (S.D.N.Y. May 12, 2003) ("[A]n important channel for attempting to resolve the Argentine debt problem will undoubtedly be the effort to negotiate a debt restructuring plan."); *cf. Pravin Banker Assocs., Ltd. v. Banco Popular del Peru*, 109 F.3d 850, 855 (2d Cir. 1997) ("the United States encourages participation in, and advocates the success of, IMF foreign debt resolution procedures").

or any other law.[9] In fact, EM/NML's expert below *conceded* that the BH Trust was a valid trust as a matter of Argentine law. Thus, there was no finding by the district court that ADSs belonged to the Republic or any other entity other than the BH Trust.

The Republic and BNA appealed the district court's decision to the Second Circuit, which affirmed in its August 3, 2010 summary order. They asserted that reversal was required because, *inter alia*, the BH Trust was indisputably a valid trust under Argentine law, which was the governing law provided for by the underlying trust instrument. In response to this argument, EM/NML argued that the court of appeals should look to New York law to disregard the BH Trust under New York's "public policy" exception for "self-settled" trusts. The court of appeals accepted plaintiffs' argument, purporting to apply New York's choice of law "interests analysis," App. 8a, but failing to make any finding that New York had a greater interest than Argentina in the dispute over BH Trust – an Argentine law trust, settled in Argentina among solely Argentine parties. Nevertheless, after citing the New York choice of law rule, the court of appeals applied New York substantive law and held the BH Trust invalid. App. 8a-9a. It therefore held that the ADSs could be deemed property of the Republic.

---

[9] The district court separately concluded, and the court of appeals affirmed, that the Public Trusts were not valid under Argentine or New York law. App. 25a, 9a-10a. But that ruling, whether correct or not (and Petitioners respectfully disagree with it), would not subject the property of the BH Trust to attachment, but would at most allow creditors to proceed against the Public Trusts' beneficial interests.

## REASONS FOR GRANTING THE PETITION

### I. THIS CASE SQUARELY PRESENTS AN ISSUE OVER WHICH THE COURTS OF APPEALS ARE DIVIDED: WHETHER THE FSIA REQUIRES FEDERAL COMMON LAW OR FORUM CHOICE OF LAW RULES.

There is a direct conflict in the courts of appeals – encompassing the Second, Ninth, Sixth and D.C. Circuits – over whether the FSIA requires a federal court to apply a federal common law choice of law rule or the forum state's rules. *Compare, e.g.*, App. 7a (citing *Barkanic v. Gen. Admin. of Civil Aviation of the P.R.C.*, 923 F.2d 957, 959 (2d Cir. 1991)), and *Brink's Ltd. v. S. African Airways*, 93 F.3d 1022, 1030 (2d Cir. 1996) (applying forum choice of law rule to case predicated on FSIA jurisdiction), *with, e.g.*, *Chuidian v. Philippine Nat'l Bank*, 976 F.2d 561, 564 (9th Cir. 1992) ("In this [FSIA] context, federal common law choice of law rules apply, not the choice of law rules of the forum state."), *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir. 1991) ("[J]urisdiction in this case is based on FSIA, not diversity. Therefore, federal common law applies to the choice of law rule determination.") (citation omitted), and *Liu*, 892 F.2d at 1426 ("[F]ederal common law provide[s] the appropriate choice of law rule in cases arising under the FSIA."), and *Oveissi v. Islamic Republic of Iran*, 573 F.3d 835, 841 & n.2 (D.C. Cir. 2009) (D.C. Circuit adopting the rule in the Second Circuit and splitting with the Ninth Circuit), and *O'Bryan v. Holy See*, 556 F.3d 361, 381 n. 8 (6th Cir. 2009) (applying forum state choice of law rules in FSIA case).

This longstanding disagreement between the courts of appeals on an issue of fundamental importance calls out for this Court's review. *See also Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 12 (2d Cir. 1996) ("Demonstrably, the law is unsettled when it comes to applying either a federal common law choice of law rule or state choice of law principles in non-diversity cases.") (noting conflict between Second and Ninth Circuits); *Dammarell v. Islamic Republic of Iran*, No.Civ.A. 01-2224JDB, 2005 WL 756090, at *18 (D.D.C. Mar. 29, 2005) (same); *In re Aircrash Disaster Near Roselawn, Ind. on Oct. 31, 1994*, 926 F. Supp. 736, 739 (N.D. Ill. 1996) (same); *In re Tex. E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 870 F. Supp. 1293, 1336 n.61 (E.D. Pa. 1992) (same).

Because of this circuit split, foreign states subject to jurisdiction in U.S. courts under the FSIA, either as defendants or as purported owners of property faced with attachment or execution, face inconsistent standards on the basic issue of what choice of law rule controls the substantive laws to which the foreign states or their property will be subject. This split is especially provocative because of the need for nationally uniform standards under the FSIA. *E.g.*, *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983) ("*Bancec*") ("When it enacted the FSIA, Congress expressly acknowledged the importance of developing a uniform body of law concerning the amenability of a foreign sovereign to suit in United States courts.") (internal quotation marks omitted); H.R. Rep. No. 94-1487, at 13, 32 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611, 6631, 6632 (noting Congress's intent to promote a "uniformity in decision" in "cases involving

foreign sovereigns" and Congress's concerns about "the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area").

This case squarely presents the circuit split. The Republic and BNA asserted that Argentine law should apply to the BH Trust as the law designated in the trust instrument. However, the court of appeals applied New York choice of law rules to determine the law governing the validity of the BH Trust for purposes of attachment of its assets, and under those rules, held that New York substantive law should control this issue. App. 7a-8a. Under New York law, the court then concluded that the ADSs were subject to attachment because it could disregard the BH Trust, based on New York's public policy exception for self-settled trusts. *Id.* at 8a-9a. If, instead, the court below had applied the applicable *federal* common law choice of law rule, as the Ninth Circuit would have done, Argentine substantive law would have governed as the law "of the state designated for this purpose in the instrument." Restatement (Second) of Conflict of Laws § 268. Under the law of the Ninth Circuit and federal common law choice of law rules, the Republic would have prevailed below, as there was no dispute that under Argentine law the ADSs were property of the BH Trust, *not* the Republic.

The inter-circuit conflict should be resolved by this Court in favor of a federal common law choice of law rule for federal courts exercising jurisdiction under the FSIA. The law defining what constitutes "property in the United States" for purposes of attachment and execution under the FSIA, as with other issues of choice of law in cases where subject matter jurisdiction

is based on the FSIA, cannot be left to the vagaries of state choice of law rules. The question of what constitutes "property in the United States" under the FSIA should be determined consistently by a uniform, federal common law choice of law rule, particularly given Congress's concerns over uniformity in suits against foreign states. Otherwise, a foreign state subject to a judgment registered in several districts across the country, for example, could face a multiplicity of results regarding what constitutes "property in the United States" and could receive conflicting immunity determinations for properties that are identically situated except for state boundary lines.

In *Bancec*, this Court described the circumstances in which the federal interest in uniformity in international relations and FSIA immunity determinations dictates that a federal court exercising jurisdiction under the FSIA apply federal common law instead of forum law, both as the choice of law rule and the substantive rule of decision. The *Bancec* Court rejected the argument that 28 U.S.C. § 1606's language "the foreign state shall be liable in the same manner and to the same extent as a private individual in like circumstances" required the application "of the law of the forum . . . including its conflict principles" to the issue in dispute. 462 U.S. at 622 n.11. The Court explained that while the FSIA required the application of a state law rule of liability governing private individuals to foreign states in like circumstances, "[t]he statute is silent, however, concerning the rule governing the attribution of liability among entities of a foreign state." *Id.* (emphasis added). The Court went on to state that in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964), it had declined to

apply the State of New York's version of the Act of State doctrine in a diversity action between a United States national and an instrumentality of a foreign state, concluding that matters bearing on the nation's foreign relations "should not be left to divergent and perhaps parochial state interpretations." *Bancec*, 462 U.S. at 622 n.11 (citation and internal quotation marks omitted). In thus applying federal common law both as the choice of law rule and the substantive rule of decision, the *Bancec* Court noted that "federal common law . . . in these circumstances is necessarily informed both by international law principles and by articulated congressional policies." *Id.* at 623.

*Bancec*'s choice of law analysis under the FSIA, and its emphasis on the need for uniformity, apply equally here given the analogous issues of attribution of ownership interests in property "among entities of a foreign state" and the "amenability" of that property to execution in a U.S. court. *Id.* at 622 n.11 (emphasis omitted). Accordingly, this Court should grant certiorari and resolve the circuit split by holding that the FSIA requires the application of the federal common law choice of law rules rather than the rules of the state which happens to be the forum.[10]

---

[10] Foreign-state immunity and foreign relations are among the narrow areas where this Court has appropriately recognized the need to create federal common law. *See Atherton v. FDIC*, 519 U.S. 213, 225, 226 (1997) (recognizing "relationships with other countries" as one of the "few and restricted instances in which this Court has created a federal common law") (citing *Sabbatino*, 376 U.S. at 425) (citation and internal quotation marks omitted); *Bancec*, 462 U.S. at 622 n.11 (rejecting New York choice of law and substantive law in favor of federal common law because of the need for uniformity under the FSIA); *Tex. Indus., Inc. v. Radcliff*

## CONCLUSION

For the reasons set forth above, a writ of certiorari should be granted.

---

*Materials, Inc.*, 451 U.S. 630, 641 (1981) ("[F]ederal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases."); *Sabbatino*, 376 U.S. at 425-26 ("[R]ules of international law should not be left to divergent and perhaps parochial state interpretations. . . . [T]here are enclaves of federal judge-made law which bind the States."). While in many instances a federal common law choice of law rule may lead to adoption of state law as the federal rule of decision, *see, e.g., Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001), it would not do so here. In the context of a dispute over a trust, the federal choice of law rule requires application of the law designated in the underlying trust instrument and, unlike New York substantive law for self-settled trusts, there is no amorphous "public policy" exception to respecting the trust form under federal common law. *See* Restatement (Second) of Conflict of Laws § 268.

Respectfully submitted,

JONATHAN I. BLACKMAN
*Counsel of Record*
CARMINE D. BOCCUZZI
CHRISTOPHER P. MOORE
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2000
jblackman@cgsh.com
cboccuzzi@cgsh.com
cmoore@cgsh.com

*Attorneys for Petitioner*
*The Republic of Argentina*

MARK S. SULLIVAN
MARIO DIAZ-CRUZ, III
LAURA M. LESTRADE
DORSEY & WHITNEY LLP
250 Park Avenue
New York, New York 10177
(212) 425-9200
sullivan.mark@dorsey.com
diaz.cruz.mario@dorsey.com
lestrade.laura@dorsey.com

*Attorneys for Petitioner*
*Banco de la Nación Argentina*

October 28, 2010

# APPENDIX

## TABLE OF CONTENTS


| | | |
|---|---|---|
| Appendix A: | Summary Order, United States Court of Appeals for the Second Circuit (August 3, 2010) | 1a |
| Appendix B: | Opinion, United States District Court for the Southern District of New York (August 18, 2009) | 14a |
| Appendix C: | Statute 28 U.S.C. § 1610(a) & (d) | 33a |

## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

**[Filed August 3, 2010]**

**09-3908-cv, 09-3928-cv**

EM Ltd.,

*Plaintiff-Appellee*,

v.

The Republic of Argentina,

*Defendant-Appellant*,

Banco de la Nación Argentina,

*Interested-Non-Party-Appellant*.

**09-3910-cv, 09-3934-cv**

NML Capital, Ltd.,

*Plaintiff-Appellee*,

v.

The Republic of Argentina,

*Defendant-Appellant*,

Banco de la Nacion Argentina,

*Interested-Non-Party-Appellant*.

---

**09-3926-cv, 09-3937-cv**

---

NML Capital, Ltd.,

*Plaintiff-Appellee*,

v.

The Republic of Argentina,

*Defendant-Appellant*,

Banco de la Nación Argentina,

*Interested-Non-Party-Appellant*.

---

**09-3927-cv, 09-3931-cv**

---

NML Capital, Ltd.,

*Plaintiff-Appellee*,

v.

| | |
|---|---|
| The Republic of Argentina, | ) |
| | ) |
| *Defendant-Appellant*, | ) |
| | ) |
| Banco de la Nación Argentina, | ) |
| | ) |
| *Interested-Non-Party-Appellant*. | ) |
| | ) |

**09-3929-cv, 09-3932-cv**

| | |
|---|---|
| NML Capital, Ltd., | ) |
| | ) |
| *Plaintiff-Appellee*, | ) |
| | ) |
| v. | ) |
| | ) |
| The Republic of Argentina, | ) |
| | ) |
| *Defendant-Appellant*, | ) |
| | ) |
| Banco de la Nación Argentina, | ) |
| | ) |
| *Interested-Non-Party-Appellant*. | ) |
| | ) |

**SUMMARY ORDER**

**RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED**

**WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.**

**At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 3rd day of August, two thousand ten.**

PRESENT:

BARRINGTON D. PARKER,
DEBRA ANN LIVINGSTON,
DENNY CHIN,
*Circuit Judges.*

FOR APPELLANT:

CARMINE D. BOCCUZZI (JONATHAN I. BLACKMAN, CHRISTOPHER P. MOORE, *on the brief*), Cleary Gottlieb Steen & Hamilton LLP, New York, NY

FOR INTERESTED-NON-PARTY-APPELLANT:

MARK S. SULLIVAN (LAURA M. LESTRADE, *on the brief*), Dorsey & Whitney LLP, New York, NY

FOR APPELLEE EM LTD.:

DAVID W. RIVKIN, JOHN B. MISSING, SUZANNE M. GROSSO, *on the brief*, Debevoise & Plimpton LLP, New York, NY

FOR APPELLEE
NML CAPITAL, LTD.:
DENNIS H. HRANITZKY (ROBERT A. COHEN , DAVID M. BIGGE, *on the brief*), Dechert LLP, New York, NY

**UPON DUE CONSIDERATION IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the district court be **AFFIRMED**.

Defendant-Appellant the Republic of Argentina ("Republic") and Interested-Non-Party-Appellant Banco de la Nación Argentina ("BNA") (together, "Appellants") appeal from an August 18, 2009 opinion and order of the United States District Court for the Southern District of New York (Griesa, *J.*) granting the motions of Plaintiffs-Appellees EM Ltd. and NML Capital, Ltd. ("Appellees") to confirm *ex parte* orders dated May 22, 2007 restraining and attaching certain assets of the Republic in a trust (the "BH Trust") administered by the U.S. Bank Trust National Association ("U.S. Bank Trust") and denying BNA's motion to vacate these orders. We assume the parties' familiarity with the underlying facts, procedural history, and the issues on appeal. For the reasons that follow, we reject the Appellants' arguments and affirm the opinion and order of the district court.

### *1. Availability of Assets for Attachment and Restraint*

As the district court explained—and as the parties do not challenge—a federal court employs the attachment and execution procedures provided by the law of the state in which the court sits. Fed. R. Civ. P. 69(a); *see Alliance Bond Fund, Inc. v. Grupo Mexicano*

*De Desarrollo, S.A.*, 190 F.3d 16, 20 (2d Cir. 1999) (applying Federal Rule of Civil Procedure 69(a) and, hence, New York law, in an Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-11, action). In this case, therefore, the district court properly employed the procedures provided under New York law.

Some of the orders confirmed by the district court were pre-judgment attachments and some were post-judgment restraints; the requirements under New York law are similar for both. *See* N.Y. C.P.L.R. §§ 5201(b), 6202. At issue here is the requirement that, if the attachment or restraint is served on a person other than the defendant, that entity must, at the time of attachment be "in the possession or custody of property in which [such person] knows or has reason to believe" the defendant or judgment debtor has an interest. N.Y. C.P.L.R. §§ 5222(b), 6214(b). We review the district court's ruling on a request for order of attachment for abuse of discretion. *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 129 (2d Cir. 2009). "The district court abuses its discretion if it applies legal standards incorrectly, relies on clearly erroneous findings of fact, or proceeds on the basis of an erroneous view of the applicable law." *Id.* We review *de novo* the district court's determination of Argentine law, *Norwind v. Rowland*, 584 F.3d 420, 429 (2d Cir. 2009), and choice of law decision, *Curley v. AMR Corp.*, 153 F.3d 5, 11 (2d Cir. 1998).

The district court determined that, after "weigh[ing] plaintiffs' offer of proof against the contrary evidence offered by BNA," *see Capital Ventures Int'l v. Republic of Argentina*, 443 F.3d 214,

222 (2d Cir. 2006) (explaining that a "court presented with an application for an order of attachment must determine whether a statutory ground for attachment exists" by "weighing . . . [the] evidence"), the Public Funds, which have the right to receive distributions from the BH Trust, are "part of the Republic" and their rights to receive distributions from the BH Trust were therefore properly attached. The court also concluded that the corpus of the BH Trust was properly attached. Appellants have not pointed to anything in the record that leads us to conclude that the district court abused its discretion when it found that the evidence weighed in favor of Appellees here. For the reasons articulated by the district court, therefore, we agree that the record shows that the Republic, on numerous occasions, took action consistent with discretionary use of the Public Funds as part of the Republic itself and that the Funds were properly attached and restrained to satisfy the debts of the Republic.

We further affirm the district court's decision to confirm the orders attaching or restraining the assets in the BH Trust. Appellants' primary argument that attachment and restraint of these assets was in error is that the BH Trust is a valid trust under Argentine law and the assets in the trust belong to the trust itself, not to the Republic. "[T]he FSIA implicitly requires courts to apply the choice of law provisions of the forum state with respect to all issues governed by state substantive law." *Barkanic v. Gen. Admin. of Civil Aviation of the People's Republic of China*, 923 F.2d 957, 959 (2d Cir. 1991); *see also Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 85 (2d Cir. 2002) ("[I]n FSIA cases, we use the forum state's choice of law rules to resolve *all* issues, except jurisdictional ones."

(internal quotation marks omitted)). Under New York law, "[t]he first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved." *Id.* If a conflict is identified, New York requires application of an "interests analysis" in which "the law of the jurisdiction having the greatest interest in the litigation [is] applied and . . . the facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict." *Id.* Finally, "New York law requires the court to honor the parties' choice [of law provision] insofar as matters of substance are concerned, so long as fundamental policies of New York law are not thereby violated." *Woodling v. Garrett Corp.*, 813 F.2d 543, 551 (2d Cir. 1987).

We therefore look to New York law to determine whether the BH Trust is a valid trust. Here, the record supports the conclusion that, despite the choice of law provision in the BH Trust agreement purporting to establish a trust pursuant to Argentine law, New York law would not recognize it as such since enforcing the trust agreement would violate "fundamental policies" of New York law. Both parties agree that, under Argentine law, the BH Trust is a valid trust that would be protected from the Republic's creditors. However, in New York, "[i]t is against public policy to permit the settlor-beneficiary to tie up her own property in such a way that she can still enjoy it but can prevent her creditors from reaching it." *Vanderbilt Credit Corp. v. Chase Manhattan Bank, NA*, 100 A.D.2d 544, 546, 473 N.Y.S.2d 242, 246 (2d Dep't 1984). For instance, "a judgment creditor may reach the corpus of the trust if the trust agreement grants the trustee the power to invade the corpus and pay the

entire principal to the settlor." *In re Portnoy*, 201 B.R. 685, 698 (S.D.N.Y. 1996).

According to the trust agreement, the corpus of the BH Trust is to be sold and distributed by order of the BH Trust trustee. However, it is the Assistance Fund—through its Executive Committee, members of which are appointed by the federal government—that directs the trustee of the BH Trust when to sell American Depository Shares ("ADSs") so that the proceeds can be distributed to the Assistance Fund and then used to capitalize the Infrastructure Fund. As the district court determined, the Assistance Fund is actually part of the Republic. In effect, then, the assets that comprise the corpus of the BH Trust are controlled directly by the Republic. Because the Republic has the current authority to direct disposition of the corpus of the BH Trust for its own benefit, we believe that, for reasons of long-standing public policy, New York law would not recognize the BH Trust as a valid trust entitled to protection against creditors. Thus, it was not error for the district court to confirm the orders attaching and restraining the corpus of the BH Trust.

Appellants additionally argue, with regard to the Public Funds, that the district court erred in performing a choice of law analysis and determining that neither Argentine or New York law would consider them to be valid trusts. We need not opine on the choice of law question with regard to the Public Trusts because even under Appellants' suggested analysis pursuant to Argentine law, for the reasons articulated in the district court's opinion, which we have reviewed *de novo*, we agree with the district court

that the Public Funds are not valid trusts protected from attachment and restraint.

Finally, we agree with the district court that the Public Funds are not protected by *First National City Bank v. Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611 (1983), in which the Supreme Court held that "duly created instrumentalities of a foreign state are to be accorded a presumption of independent status." *Id.* at 627. Whether an entity is an instrumentality or an agency of the foreign state is determined by considering "whether the core functions" of the entity "are predominately governmental or commercial." *Garb v. Republic of Poland*, 440 F.3d 579, 594 (2d Cir. 2006) (internal quotation marks omited). If the entity at issue is an instrumentality of the foreign state, its property cannot be used to satisfy the judgments of that state. *See De Letelier v. Republic of Chile*, 748 F.2d 790, 795 (2d Cir. 1984). The *Bancec* presumption can be overcome if, under the principles of corporate law, the separate juridical status of the instrumentality should be disregarded. *Id.* at 794; *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 477 (2d Cir. 2007).

Here, we need not decide whether the Funds are or are not entitled to the *Bancec* presumption as instrumentalities of the Republic since, even if they are, we would determine that the Funds are "so extensively controlled by [their] owner that a relationship of principal and agent is created" such that the presumption would be overcome. *See Bancec*, 462 U.S. at 629. The Assistance Fund is controlled by state appointees who make decisions about when to access the assets in the BH Trust in order to effectuate the goals of the Infrastructure Fund. And as previously

discussed, the Republic has repeatedly treated the Funds as its own. This is sufficient for us to conclude that, even if the Funds are properly considered instrumentalities, any presumption of a separate juridical status has been overcome.

*2. Foreign Sovereign Immunities Act*

Pursuant to the FSIA, "property in the United States of a foreign state shall be immune from attachment arrest and execution," except as otherwise provided by exceptions set forth in 28 U.S.C. §§ 1610 and 1611. 28 U.S.C. § 1609. At issue here are sections 1610(a) and (d), which authorize pre- or post-judgment attachment of "property in the United States of a foreign state . . . used for a commercial activity in the United States." *Id.* § 1610(a), (d). "[T]he property that is subject to attachment and execution must be 'property in the United States of a foreign state' and must have been 'used for a commercial activity' at the time the writ of attachment or execution is issued." *Aurelius Capital Partners, LP*, 584 F.3d at 130 (quoting 28 U.S.C. § 1610) (italics omitted). The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). "The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.* The Supreme Court explained that a foreign state engages in commercial activity "when a foreign government acts, not as a regulator of a market, but in the manner of a private player within it." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992); *see also De Letelier*, 748 F.2d at 797 (explaining the inquiry focuses on

"whether the activity is of the type an individual would customarily carry on for profit").

Appellants contend that, contrary to the determination of the district court, the Public Funds' beneficial interests in the BH Trust are not located in the United States and, in any event, none of the attached or restrained property was being used for a commercial activity at the time of attachment. We disagree. As the district court—and Appellants—recognize, the situs of intangible property, such as beneficial interests, is "the location of the party of whom performance is required by the terms of the contract." *ABKCO Indus., Inc. v. Apple Films, Inc.*, 39 N.Y.2d 670, 675, 385 N.Y.S.2d 511, 513 (1976). There is ample evidence in the record to support the district court's determination that the property is located in New York, not Argentina. The BH Trust trust agreement specifies that the trustee of the BH Trust "shall dispose of any Option ADSs or Option Shares . . . remaining in the Trust Property pursuant to the instructions received by the Trustee from" the trustee of the Assistance Fund. Thus, in order to effectuate capitalization of the Public Funds, by the terms of the trust agreement, U.S Bank Trust is required to perform as ordered by the Assistance Fund. The record supports the conclusion that U.S. Bank Trust—the party of whom performance is required—is located in New York. The Garnishee's Statement shows that the BH Trust is held in New York State by U.S. Bank Trust and the United States address of the BH Trust is on Wall Street, which the trust agreement designates as the address of the "principal corporate trust office." Thus, the Public Funds' beneficial interests in the BH Trust are located in New York and

are thus "property in the United States" that were properly attached or restrained by the district court.

We further conclude that, at the time of attachment, the corpus of the BH Trust and the beneficial interests which the Public Funds hold in the BH Trust were being used for a commercial activity. At the time of attachment, the options on the ADSs in the BH Trust had expired and the ADSs themselves were the principal asset forming the corpus of the BH Trust. The purpose of the Public Funds, at the time of attachment, was to facilitate the sale of these ADSs at a time favorable to the Republic. The corpus of the BH Trust was therefore an investment of the Republic and the Public Funds' assets were, as the district court determined, being used to facilitate the investment and eventual sale of the securities. An investment of this sort is the kind of activity that a private player in the market would carry on for profit and is, therefore, a "commercial activity" under the FSIA.

We have considered the remainder of the Appellants' arguments and find them to be without merit.

For the foregoing reasons, the judgment of the district court is hereby **AFFIRMED**.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

## APPENDIX B

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

**03 Civ. 2507 (TPG)**

**[Filed August 18, 2009]**

| | |
|---|---|
| EM LTD., | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| -against - | ) |
| | ) |
| THE REPUBLIC OF ARGENTINA, | ) |
| | ) |
| Defendant. | ) |
| | ) |

**03 Civ. 8845 (TPG)**
**05 Civ. 2434 (TPG)**
**06 Civ. 6466 (TPG)**
**07 Civ. 1910 (TPG)**

| | |
|---|---|
| NML CAPITAL, LTD., | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| -against - | ) |

THE REPUBLIC OF ARGENTINA, )
)
Defendant. )
)

## OPINION

Plaintiffs in these actions own defaulted bonds issued by defendant, the Republic of Argentina. Plaintiffs move to confirm certain orders issued by the court on May 22, 2007 restraining and attaching certain assets of the Republic in a trust administered by the U.S. Bank Trust National Association. Banco de la Nación Argentina ("BNA"), as trustee of those assets, opposes the motion and moves to vacate the orders. Plaintiffs' motion to confirm is granted, and BNA's motion to vacate is denied.

### Background

#### Procedural History

On May 22, 2007, on plaintiffs' ex parte motion, the court issued three orders authorizing plaintiffs' attorneys to levy upon certain assets said to belong to the Republic. The orders all directed plaintiffs to "refrain from taking [the assets] into actual custody pending further order of this Court." As described below, the form of the orders differed slightly based on the posture of the cases to which they related. However, all of the orders affected two groups of assets: any beneficial interest of the Republic in the "BH Options Trust" (the "BH Trust"), and assets held by the BH Trust. The orders specifically referred to interests held by the trust in BNA's name, which was done because of BNA's function as trustee of the Fondo

Fiduciario Federal de Infraestructura Regional ("Infrastructure Fund" or "FIR Fund") and the Fideicomiso de Asistencia al Fondo Fiduciario Federal de Infraestructura Regional ("Assistance Fund"). As disclosed in a Garnishee Statement filed in response to the orders, these assets are held by the U.S. Bank Trust National Association.

At the time of the orders, EM Ltd., the plaintiff in case 03 Civ. 2507, and NML Capital, Ltd., the plaintiff in case 03 Civ. 8845, had already obtained judgments against the Republic. Therefore, the court issued Restraining Orders in those cases. In cases 05 Civ. 2434, 06 Civ. 6466, and 07 Civ. 1910, however, plaintiff NML had not yet obtained judgments. In those cases, the court therefore issued an Order of Attachment and Temporary Restraining Order. NML subsequently received judgments in cases 05 Civ. 2434 and 06 Civ. 6466 on May 28, 2009; those judgments were amended on June 12, 2009.

Plaintiffs moved to confirm the orders. The Republic did not submit any argument with respect to these orders. However, since BNA is the trustee of the Infrastructure Fund and Assistance Fund, and therefore the garnishee under the attachment and restraining orders, it opposed plaintiffs' motion and cross-moved to vacate the orders. BNA is a non-party, and there is no dispute for the purposes of this motion that it is an independent entity and that it is not directly liable for the Republic's default.

Plaintiffs and BNA have both submitted several declarations setting forth facts relevant to this dispute. Although they dispute the nature of the Republic's interest in these assets, they generally agree about

many of the basic facts, including facts about the provenance of the assets. Therefore, except where otherwise indicated, the facts set forth below are undisputed.

The BH Trust

The BH Trust was established in 1999 as part of a transaction to sell securities in Banco Hipotecario Nacional, which, at the time, was an Argentine state-owned bank. The privatization of Banco Hipotecario involved offerings of shares, American Depository Shares ("ADSs"), and options to buy shares or ADSs in the bank. The shares offered to the general public were called "Class D" shares.

In support of the privatization effort, the BH Trust held ADSs that corresponded to the Class D shares. These ADSs were to be used to satisfy redemptions of options held by investors in the bank. After those options expired on February 2, 2004, the trust continued to hold 9,090,500 ADSs that corresponded to unexercised options. These securities are now the principal asset of the BH Trust.

The BH Trust is governed by a trust agreement, which provides that, upon order of the trustee, the trust's proceeds are distributed to the Assistance Fund. Any residual funds left over after such distributions are given to the Infrastructure Fund. BNA is designated as the trustee of the BH Trust, and therefore has the exclusive power to order these distributions to occur. Because the Banco Hipotecario options corresponding to the ADSs have expired, there are no entities other than the Assistance Fund,

Infrastructure Fund and, according to plaintiffs, the Republic, that are beneficiaries of the BH Trust.

The Infrastructure and Assistance Funds

The Infrastructure and Assistance Funds were also set up in connection with the privatization of Banco Hipotecario. Both are referred to as "fiduciary funds" or "public trusts."

The Infrastructure Fund was established by Law No. 24,855. That law created the fund to finance "economic and social infrastructure projects" of Argentina's national and provincial governments. The law specified that the fund would "operate within the environment of the Chief of Cabinet Ministers" and would be administered by a board of seven individuals appointed by the federal Executive Branch. The law also requires BNA to serve as the trustee of the fund and administer it "in accordance with instructions received from the administrative board." Subsequently, presidential decree No. 924/97, which implements this law, specified that a private association, the Argentine Construction Chamber, would be asked to nominate individuals to serve on the board. In decree No. 924/97, the national and provincial governments are described as the beneficiaries of the trust, with the national government also described as the residual beneficiary.

The Assistance Fund was established by presidential decree No. 924/97. The "sole purpose" of the Assistance Fund is "to proceed with capitalizing the [Infrastructure Fund] through the contribution of the net proceeds from the sale of the shares of" Banco Hipotecario. The Assistance Fund is required to "act

according to the instructions" of its Executive Committee, the members of which are appointed by officials of the federal government. BNA is appointed as the "Fiduciary Agent" of the Assistance Fund. The Assistance Fund principally owns "Class A" shares in Banco Hipotecario, which, by law, can only be owned by the Republic itself.

Thus, in short, proceeds from the Banco Hipotecario sale—which include the ADSs now being held in the BH Trust—accrue to the Assistance Fund, which then funds the Infrastructure Fund, which then makes loans to the federal and provincial governments to support infrastructure development.

The CPLR and the Republic's Interest in the Attached Property

Under the Federal Rules of Civil Procedure, a federal court employs the attachment and execution procedures provided by the law of the state in which the court sits. See Fed. R. Civ. P. 64 (referring to state law for pre-judgment attachment procedures); Fed. R. Civ. P. 69 (referring to state law for post-judgment execution procedures). The New York Civil Practice Law and Rules ("CPLR") therefore govern the attachment and restraint of assets under these orders.

The CPLR impose similar requirements for both pre-judgment attachments and post-judgment restraints. First, attachments and restraints must be issued against "property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested." CPLR §§ 5201(b); 6202. Second, if the attachment or restraint is served on a person other than the

defendant, that person must, at the time of service, owe a debt to the defendant or be "in the possession or custody of property in which such person knows or has reason to believe" that the defendant has an interest. §§ 5222, 6214(b).

For a pre-judgment attachment to be confirmed, a plaintiff must satisfy three additional requirements. First, one of five statutory grounds for attachment must exist. CPLR § 6201. One of these grounds is that the defendant is not a domiciliary of New York, § 6201(1), and another is that "the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment," has assigned or concealed property, or removed it from New York, "or is about to do any of these acts." § 6201(3). Second, the plaintiff must establish that it has a cause of action, that it is likely to succeed on the merits, and that the amount demanded from the defendant exceeds the defendant's known counterclaims against the plaintiff. CPLR § 6212. Third, the plaintiff must establish a need for continuing the attachment. CPLR § 6213.

Plaintiffs have indisputably satisfied most of these requirements. First, the Republic is a nondomiciliary residing outside New York. Second, the plaintiffs have a cause of action and are likely to succeed on the merits, given the Republic's undisputed liability in these actions. Third, since the Republic has not asserted counterclaims against the plaintiffs, the amounts sought by plaintiffs exceed the value of the Republic's counterclaims. Fourth, there is a need to continue the attachments, since the funds could be immediately transferred outside the United States if the court's orders were vacated.

The remaining requirements are more complex. Plaintiffs seek to restrain and attach the corpus of the BH Trust, as well as the Republic's "rights to receive distributions" from the BH Trust "as Certificateholder through the Assistance Fund, and as Residual Beneficiary through the [Infrastructure] Fund." Thus, for the orders to be confirmed, the court must find that (1) the Republic has an interest in the corpus of the BH Trust, as well as a right to distributions from the BH Trust, (2) the Republic's right to distributions gives it an interest in the trust assets, and (3) these interests are "property which could be assigned or transferred."

There is no question that the Assistance Fund has a right to distributions from the BH Trust, and that the Infrastructure Fund has a right to receive any residual distributions upon the termination of the BH Trust. However, the critical question is whether the Republic's rights to the BH Trust assets are equivalent to the Funds' rights. In essence, plaintiffs argue that because the Republic has repeatedly treated the Assistance and Infrastructure Funds as a discretionary source of revenue, it has shown that the Republic has the same rights to distributions as the Assistance and Infrastructure Funds do.

There is an initial question as to plaintiffs' burden of proof on these motions. Plaintiffs argue that they need only make out a prima facie case and that the facts they allege must be assumed to be true. Although this is true when a court is considering whether a plaintiff has shown that it is likely to succeed on the merits of the case, that is not a disputed question on this motion. See, e.g., Bank of Leumi Trust Co. of N.Y. v. Istim, Inc., 892 F. Supp. 478, 482 (S.D.N.Y. 1995).

Plaintiffs have cited no case, and the court has found none, that applies such a liberal standard with respect to the other elements that plaintiffs must satisfy. To the contrary, the Second Circuit has indicated that in determining whether a plaintiff has satisfied the statutory grounds for attachment, it must engage in the "weighing of evidence and also in balancing competing considerations." Capital Ventures Int'l v. Republic of Arg., 443 F.3d 214, 222 (2d Cir. 2006). It is therefore more appropriate to weigh plaintiffs' offer of proof against the contrary evidence offered by BNA, rather than simply assuming that plaintiffs' allegations are true.

Even under that standard, however, the evidence establishes that the Assistance and Infrastructure Funds are part of the Republic. First, plaintiffs have demonstrated that the Republic has treated the assets of the Assistance and Infrastructure Funds as assets of the Republic itself. In 2004, the Republic issued a presidential decree, Decree No. 906/2004, which required the Infrastructure and Assistance Funds (along with several other fiduciary funds) to invest their assets in Argentine treasury bills and in financial instruments issued for the purpose of financing infrastructure projects. The decree referred to these funds as "the national government's trust funds," and characterized the measure as part of a strategy to "reactivate the economy" and satisfy "the public treasury's temporary needs for liquid assets" without resorting to "an increase in public debt." In 2001, Decree No. 957/01 lowered the salaries of the administrators of fiduciary funds, including the Infrastructure Fund, and required the savings to be contributed to the national treasury. In 2002, Law No. 25,565 required fiduciary funds, including the

Infrastructure Fund, to together contribute 200 million pesos "for the payment of debt." BNA contends that the Infrastructure Fund was ultimately not required to make the payments to the treasury that Decree 957/01 and Law 25,565 mandated. Nonetheless, it is still the case that on at least three occasions, the Argentine government issued requirements that, in essence, treated the assets of the Assistance and Infrastructure Funds as assets of the Republic itself.

Second, the principal asset of the Assistance Fund is Class A shares in Banco Hipotecario. Law No. 24,855, which set up the Infrastructure Fund and instituted the privatization of Banco Hipotecario, defined Class A shares as shares "owned by the Federal Government." Although Class A shares can be sold to private entities, they are immediately converted to Class C or D shares when that happens. Moreover, as long as the Class A shares remain the principal asset of the Assistance Fund, "all the political rights emerging from them will belong to the State." BNA contends that the Assistance Fund merely holds the Class A shares as an agent of the Republic. Even assuming that to be true, however, the Republic is still the owner of the shares, and therefore of the Assistance Fund's assets.

The Republic's own actions therefore establish that the Assistance and Infrastructure Funds are essentially used as discretionary funds of the Republic, and that the Republic has a right to use the assets of the Funds as it wishes. The Funds are therefore part of the Republic, and, by extension, the Republic has the same legal rights as the Funds themselves. Since it is undisputed that the Assistance and Infrastructure Funds have a right to distributions from the BH Trust,

and ultimately to the corpus of the Trust, the Republic has these rights as well. Since the trust agreement explicitly provides for assignments and transfers of the interests of the Funds in the BH Trust, the Funds' interests in the BH Trust constitute "property which could be assigned or transferred," as required by the CPLR.

Protection Under Trust Law

BNA argues that, under Argentine law, the Assistance and Infrastructure Funds should be viewed as "trusts," and their assets should therefore be considered immune from the Republic's creditors. Plaintiffs contend that Argentine law does not extend such protection to the Assistance and Infrastructure Funds. They further contend that if Argentine law did provide such protections, the court could not enforce that immunity as a matter of New York law.

This dispute presents the preliminary question of whether to look to New York or Argentine law. New York's choice-of-law rules, which govern in this context, require the court to first determine whether there is an actual conflict between the laws of New York and Argentina. Karaha Bodas, LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70, 85 (2d Cir. 2002). If a conflict does exist, the law of the jurisdiction having the greatest interest in the litigation is applied. Id. These interests are determined by identifying the purposes of the conflicting laws and evaluating the facts of the case that relate to those purposes. Id. at 87.

In this case, there is no conflict, since neither Argentine nor New York law would treat the Assistance and Infrastructure Funds as valid trusts.

Argentine Law

Argentine trust law is set forth primarily in Law No. 24,441. That law states that a trust exists when a settlor "transfers fiduciary ownership of certain assets to another (trustee), who undertakes to exercise that ownership in benefit of whoever is designated in the trust agreement (beneficiary)." The law also provides that the trustee has the power to "dispose of or encumber the assets in trust when so required by the purposes of the trust, without the consent of the settlor or the beneficiary being necessary, unless otherwise agreed." Furthermore, a trustee is legally entitled to receive a management fee and to resign. Assets in trust are considered "separate from the assets of the trustee and the settlor." Trust assets are then exempt from legal action by the creditors of either the trustee or, except in a case of fraud, the settlor. However, a "beneficiary's creditors may exercise their rights to the fruits of the assets in trust and subrogate the beneficiary's rights."

Law No. 24,855, however, which established the Infrastructure Fund, explicitly preempts Law No. 24,441, to the extent that they conflict. This is consistent with the fact that the fiduciary funds are considered to be distinct from the typical "private" trust envisioned by Law 24,441. The fiduciary funds are all created by legislation with the purpose of using their funds for public purposes, and they do not bear all of the hallmarks of a conventional private trust.

An initial matter of nomenclature must be resolved. If the Funds were considered to be trusts, the Republic would be both their settlor and the beneficiary. The parties appear to agree that the Republic is properly considered the settlor of the Infrastructure Fund, since, by privatizing Banco Hipotecario, it provided the assets to the funds.

The Republic is also the beneficiary of both Funds, despite BNA's argument that the Infrastructure Fund has no beneficiary and that the beneficiary of the Assistance Fund is the Infrastructure Fund. BNA's position is inconsistent with Decree Nos. 924/97 and 228/98, both of which refer to the Republic as a beneficiary of the Infrastructure Fund. Moreover, Law 24,441 defines a beneficiary as the entity for whose benefit a trust is operated, which is clearly the Republic in this case. In addition, if it were true that the Infrastructure Fund has no beneficiary, it could not be considered a trust within the scope of Law 24,441. Since both Funds operate for the benefit of the Republic—whether as a source for infrastructure financing or more general financial needs—the Republic is clearly the beneficiary of the Funds.

For two primary reasons, the Funds do not qualify as "trusts" for purposes of Law 24,441, and therefore cannot invoke the protections afforded to trusts by Argentine law.

First, BNA is forbidden from managing the trust assets without the Republic's consent. It is, in fact, specifically required to follow the instructions of officials appointed by the Republic. Indeed, by BNA's own account, BNA has little involvement in managing the trust funds, and instead leaves those

responsibilities to the officials appointed by the government. This is contrary to the requirement of Law 24,441 that trustees have the power to manage assets "without the consent of the settler or the beneficiary." Similarly, the prohibition on BNA resigning as trustee or accepting a management fee is contrary to the typical powers of a trustee under Law 24,441.

BNA's arguments on this issue are unconvincing. BNA argues that Law 24,441 allows trustees' decisions to be subject to the consent of a settlor or beneficiary, as long as that is set forth in the trust agreement. However, plaintiffs have offered persuasive evidence from experts in Argentine law that this provision is typically understood to allow a settlor to consult with the trustee on the use of trust assets, not to control the trustee's decisionmaking by requiring the trustee to adhere to instructions of the settler's appointees.

Furthermore, as discussed above, the assets of the Assistance and Infrastructure Funds are not treated as distinct from the assets of the settlor, the Republic. To the contrary, the Republic has repeatedly decreed that the assets of the Assistance and Infrastructure Funds are a legitimate source of funds for the Republic itself. It may be true, as BNA contends, that the Funds are nominally "extra-budgetary" entities, and therefore do not receive any appropriations from the national treasury. Nonetheless, that fact has not prevented the Republic from determining that it had the power to use the Funds' assets without seeking permission of the "trustee."

These conclusions are bolstered by an opinion of Argentina's Attorney General, which determined that

because of the "restrictions posed by" Law 24,855 on BNA, "the term 'trustee' is used [with respect to the Funds] in the sense of [an] agent." Similar conclusions have been reached by other Argentine legal experts, including a law professor who has submitted detailed affidavits on behalf of plaintiffs. These opinions are well supported by the facts discussed above, and are significantly more persuasive than the opinions of BNA's experts.

Argentine trust law would therefore not shield the assets of the Assistance and Infrastructure Funds from the Republic's creditors.

New York Law

Plaintiffs argue that New York trust law would not recognize the Funds as trusts. BNA does not address this argument, and may therefore be deemed to have conceded it. Irrespective, plaintiffs are correct on the merits.

CPLR section 5205(c) exempts from attachment and restraint the principal of a trust "created by . . . a person other than the judgment debtor." However, since the Republic, the judgment debtor, created the Funds, section 5205(c) facially does not apply.

Furthermore, New York trust law provides that a trust "for the use of the creator is void as against the existing or subsequent creditors of the creator." N.Y. Est. Powers & Trusts Law § 7-3.1(a). Thus, "when a person creates for his own benefit a discretionary trust, his creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him" because it "is against public policy to

permit the settlor-beneficiary to tie up her own property in such a way that she can still enjoy it but can prevent her creditors from reaching it." Vanderbilt Credit Corp. v. Chase Manhattan Bank, NA, 100 A.D.2d 544, 546 (2d Dep't 1984). Since, as discussed above, the Republic created the Funds for its own benefit (and has subsequently used the assets of the Funds for its own benefit), New York law does not protect the assets of the Funds from the creditors of the Republic.

Finally, it is commonly accepted that "creditors of a trust beneficiary . . . can subject the interest of the beneficiary to the satisfaction of their claims." Restatement (Third) of Trusts § 56; see also N.Y. Est. Powers & Trusts Law § 7-3.4.

Like Argentine law, New York law would therefore permit the attachment of these funds.

The Bancec Presumption and the FSIA

BNA's remaining arguments are unpersuasive.

First, the assets of the Funds are not protected by the doctrine of First National City Bank v. Banco Para el Comercio Exterior de Cuba ("Bancec"). In Bancec, the Supreme Court held that "a presumption of independent status" attaches to "instrumentalities established as juridical entities distinct and independent from their sovereign." 462 U.S. 611, 626-27 (1983). However, nothing in the legislation creating the Assistance and Infrastructure Funds indicates that the Funds were established as distinct, independent entities. As discussed above, the conduct of the Republic with respect to the Funds establishes

that the Funds are not viewed by the government as distinct entities. Furthermore, plaintiffs contend that Argentine law requires that an entity can only be considered a separate "juridical entity" under Argentine law if it is explicitly designated one, and BNA has not disputed this. At most, BNA has offered evidence that the Funds have the power to contract and engage in litigation, but the Second Circuit has, in a related context, noted that it would be inappropriate to give dispositive weight to such powers. Garb v. Republic of Pol., 440 F.3d 579, 595.

Second, the assets of the Funds are not immune from attachment and execution under the Foreign Sovereign Immunities Act ("FSIA"). The FSIA provides exceptions to sovereign immunity when (1) the property is "used for a commercial activity in the United States," (2) the sovereign has waived its immunity from attachment and execution, and, in cases where a judgment has not yet issued, (3) "the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction." 28 U.S.C. § 1610(a), (d). These requirements are all satisfied here.

The basic inquiry in determining whether an activity is "commercial" is "whether the activity is of the type an individual would customarily carry on for profit." De Letelier v. Republic of Chile, 748 F.2d 790, 797 (2d Cir. 1984). The FSIA mandates that "the commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." § 1603(d). Thus, courts must focus on the "actual," immediate use of funds, rather

than on why that use is occurring. EM Ltd. v. Republic of Arg., 473 F.3d 463, 484-85 (2d Cir. 2007). Thus, "when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial.'" Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 614 (1992).

By using the Funds' assets to facilitate the sale of securities, the Republic acted as nothing more than a "private player" in the market, and therefore used the property for a commercial activity in the United States. Although BNA contends that the court should consider the ultimate use of the Republic's profits to fund infrastructure projects, the court is not permitted to consider the "purpose" of the Republic's activity in determining whether it was commercial in nature.

With respect to waiver, the second element of the exception to immunity, it has been repeatedly recognized that when the Republic issued the defaulted bonds at issue here, it explicitly waived its sovereign immunity from suits based on the bonds. See EM, 473 F.3d at 468, 480 n.18. Since, as discussed above, the Funds are part of the Republic and are not distinct entities, that waiver extends to the Funds' assets as well. Finally, there is no dispute that the purpose of the attachment in the pre-judgment cases here was to secure satisfaction of the judgment, and not to obtain jurisdiction.

Third, the frozen property is located in New York, and is therefore subject to attachment by the court. BNA contends that the Republic's beneficial interests in the Fund assets can only be located in Argentina. Under New York law, however, the situs of intangible

property, such as beneficial interests, is "the location of the party of whom performance is required by the terms of the contract." ABKCO Indus., Inc. v. Apple Films, Inc., 39 N.Y.2d 670, 675 (1976). Here, for the Republic's interests in the Fund assets to be satisfied, action must be taken by U.S. Bank, where the BH Trust is located. The situs of those interests is, therefore, New York, and is within the court's jurisdiction.

## Conclusion

For the reasons stated above, plaintiffs' motion to confirm the May 22, 2007 orders is granted, and BNA's motion to vacate the orders is denied.

SO ORDERED.

Dated: New York, New York
August 19, 2009

/s/ Thomas P. Griesa
Thomas P. Griesa
U.S.D.J.

## APPENDIX C

**28 U.S.C. § 1610(a) & (d)**

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or ....

(2) the property is or was used for the commercial activity upon which the claim is based ...

* * *

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if--

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

179 (2)

No. 10-572

IN THE
# Supreme Court of the United States

THE REPUBLIC OF ARGENTINA ET AL.,
*Petitioners,*

v.

EM LTD. ET AL.,
*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## BRIEF IN OPPOSITION FOR EM LTD. AND NML CAPITAL, LTD.


DAVID W. RIVKIN
JOHN B. MISSING
SUZANNE M. GROSSO
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000

*Counsel for Respondent EM Ltd.*

ROBERT A. COHEN
*Counsel of Record*
DENNIS H. HRANITZKY
DECHERT LLP
1095 Avenue of the Americas
New York, NY 10036-6797
(215) 963-5000
robert.cohen@dechert.com

*Counsel for Respondent NML Capital, Ltd.*

## QUESTION PRESENTED

The Foreign Sovereign Immunities Act (FSIA) provides that "district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity." 28 U.S.C. § 1330(a).

In a suit against a foreign state arising under the FSIA, must a district court apply the choice-of-law rules of the forum state or federal common law choice-of-law rules, as set forth in the Restatement (Second) of Conflict of Laws (1969)?

## RULE 29.6 STATEMENT

Neither NML Capital, Ltd. nor EM Ltd. is publicly traded; neither entity has any corporate parents; and no publicly held corporation owns 10% or more of the stock of either entity.

## TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

RULE 29.6 STATEMENT ..... ii

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

STATEMENT ..... 1

REASONS FOR DENYING THE PETITION ..... 7

I. PETITIONERS DID NOT PRESERVE THE QUESTION PRESENTED BELOW ..... 8

II. THIS CASE IS AN INADEQUATE VEHICLE BECAUSE RESOLUTION OF THE QUESTION PRESENTED IN PETITIONERS' FAVOR WOULD NOT CHANGE THE OUTCOME ..... 10

A. The Second Restatement Sets Forth Precisely The Same Rule That The Second Circuit Applied ..... 10

B. Vacating The District Court's Order Would Have No Practical Impact ..... 14

III. THE QUESTION PRESENTED IS NOT SQUARELY IMPLICATED BECAUSE THE FEDERAL RULES OF CIVIL PROCEDURE REQUIRE APPLICATION OF NEW YORK LAW IN THE UNIQUE CONTEXT OF THIS CASE ..... 15

IV. PETITIONERS VASTLY OVERSTATE THE IMPORTANCE OF THE QUESTION PRESENTED ..... 17

CONCLUSION ..... 20

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

*Barkanic v. Gen. Admin. of Civil Aviation of the People's Republic of China*, 923 F.2d 957 (2d Cir. 1991) .....5

*Beatie & Osborn LLP v. Patriot Scientific Corp.*, 431 F. Supp. 2d 367 (S.D.N.Y. 2006) .....10, 12

*Chiudian v. Philippine Nat'l Bank*, 976 F.2d 561 (9th Cir. 1992).....17

*City of Springfield, Mass. v. Kibbe*, 480 U.S. 257 (1987) (per curiam) .....8

*Clalit Health Servs. v. Israel Humanitarian Found.*, 385 F. Supp. 2d 392 (S.D.N.Y. 2005).....13

*EM Ltd. v. Republic of Argentina*, 473 F.3d 463 (2d Cir. 2007) .....2

*Estee Lauder Cos. Inc. v. Batra*, 430 F. Supp. 2d 158 (S.D.N.Y. 2006).....12

*First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983).....4, 7, 19

*Gagan v. Monroe*, 269 F.3d 871 (7th Cir. 2001).....16

*Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70 (2d Cir. 2002) .....5, 16

*Krumme v. WestPoint Stevens Inc.*, 238 F.3d 133 (2d Cir. 2000) .....9

*Lebron v. Nat'l R.R. Passenger Corp.*,
513 U.S. 374 (1995) ..... 17

*Liu v. Republic of China*,
892 F.2d 1419 (9th Cir. 1989) ..... 17

*Marine Midland Bank, N.A. v. United Mo. Bank, N.A.*, 643 N.Y.S.2d 528 (N.Y. App. Div. 1996) ..... 12

*In re Mark Frankel*,
___ N.Y.S.2d ___, 2010 WL 5909624 (N.Y. App. Div. Nov. 30, 2010) ..... 12

*O'Bryan v. Holy See*,
556 F.3d 361 (6th Cir. 2009) ..... 19

*Oveissi v. Islamic Republic of Iran*,
573 F.3d 835 (D.C. Cir. 2009) ..... 19

*Radioactive, J.V. v. Manson*,
153 F. Supp. 2d 462 (S.D.N.Y. 2001) ..... 12

*Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777 (9th Cir. 1991) ..... 17

*Schreiber v. Kellogg*,
50 F.3d 264 (3d Cir. 1995) ..... 16

*Shannon v. Irving Trust Co.*,
9 N.E.2d 792 (N.Y. 1937) ..... 13

*Taylor v. Freeland & Kronz*,
503 U.S. 638 (1992) ..... 9

*Tehran-Berkeley Civil and Envtl. Eng'rs v. Tippetts-Abbett-McCarthy-Stratton*,
888 F.2d 239 (2d Cir. 1989) ..... 9

*Vanderbilt Credit Corp. v. Chase Manhattan Bank, NA*, 473 N.Y.S.2d 242 (N.Y. App. Div. 1984) ..... 6

*Walker Int'l. Holdings, Ltd. v. Republic of Congo*, 415 F.3d 413 (5th Cir. 2005) ..... 15

*Welsbach Elec. Corp. v. MasTec N. Am., Inc.*, 859 N.E.2d 498 (N.Y. 2006) ..... 12

*Woodling v. Garrett Corp.*, 813 F.2d 543 (2d Cir. 1987) ..... 5, 11

**STATUTES & RULES**

28 U.S.C. § 1254(1) ..... 1

28 U.S.C. § 1330(a) ..... 2

28 U.S.C. § 1606 ..... 18

Fed. R. Civ. P. 64 ..... 15

Fed. R. Civ. P. 69(a)(1) ..... 15

N.Y. C.P.L.R. § 5222(b) ..... 4

N.Y. C.P.L.R. § 6214(b) ..... 4

**OTHER SOURCES**

Jaccard, Michel A., *Securing Copyright in Transnational Cyberspace*, 35 Colum. J. Transnat'l L. 619 (1997) ..... 18

N.Y. Jur. § 33 ..... 12

Restatement (Second) of Conflict of Laws ..... *passim*

Symeonides, Symeon C., *Choice of Law in the American Courts in 2008: Twenty-Second Annual Survey*, 57 Am. J. Comp. L. 269 (2009) ..... 17

## BRIEF IN OPPOSITION FOR EM LTD. AND NML CAPITAL, LTD.

Respondents EM Ltd. and NML Capital, Ltd. respectfully submit this brief in opposition to the petition for a writ of certiorari filed by defendants The Republic of Argentina and Banco de la Nación Argentina.

## OPINIONS BELOW

The summary order of the court of appeals is unpublished but is electronically reported at 2010 WL 3001777. Pet. App. 1a. The opinion of the district court is also unpublished but is electronically reported at 2009 WL 2568433.

## JURISDICTION

The court of appeals filed its order on August 3, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATEMENT

Respondents ask this Court to reverse the summary order of the Second Circuit on the ground that the panel should have applied federal common law choice-of-law rules, as set forth in the Restatement (Second) of Conflict of Laws (1969), rather than the choice-of-law rules of New York because this case arises under the Foreign Sovereign Immunities Act (FSIA). Petitioners never raised this argument with the Second Circuit, and with good reason: The New York choice-of-law rule applied by the panel is precisely the same rule that the Second Restatement requires. This Court therefore could not reverse the judgment below even if it resolved the question presented in petitioners' favor. Moreover, even absent

that fatal vehicular problem, this Court would be unable to reach the question presented because Federal Rules of Civil Procedure 64 and 69 expressly require the application of the forum state's law for the attachment and execution remedies at issue here. Finally, to the extent the Ninth Circuit has departed from the view of the Second Circuit and at least two other circuits on the question presented, that departure has too little practical importance and too high of a likelihood of self-correction to justify this Court's intervention at this time.

The petition for a writ of certiorari should be denied.

1. Petitioner Republic of Argentina has a checkered history of defaulting on its public debt stretching back to the Nineteenth Century. *See EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 466 n.2 (2d Cir. 2007). In late 2001, it once again repudiated all of its external public debt in the largest sovereign default in history. Respondents, holders of bonds on which Argentina defaulted, have obtained over $2.3 billion in judgments against Argentina in the Southern District of New York, which had subject matter jurisdiction over the actions under the FSIA, because Argentina is a "foreign state." *See* 28 U.S.C. § 1330(a). To date, Argentina has refused to satisfy any of those judgments. For that reason, respondents have sought to execute the judgments against the few assets that Argentina holds in the United States. Respondents have also sought prejudgment attachment orders in cases where final judgments have not yet been entered.

On May 22, 2007, respondents obtained an *ex parte* attachment order and restraining orders from the district court attaching and restraining both the corpus of a trust located in the United States called the "BH Trust" and the beneficiaries' property inter-

ests in that trust. The BH Trust was created by Argentina in 1999 in connection with the sale of a state-owned bank called Banco Hipotecario Nacional (now Banco Hipotecario S.A. ("BH")). Specifically, investors outside of Argentina were offered options to purchase American Depository Shares ("ADSs"), each of which corresponded to 10 class "D" shares in BH. When the options exercise period ended on February 1, 2004, over 9 million ADSs remained in the BH Trust, and Argentina reverted to being the Trust's sole beneficiary. Pet. App. 17a. The BH Trust now contains cash and ADSs currently worth over $70 million.

The trustee of the BH Trust is U.S. Bank Trust National Association, through its Argentine Permanent Representation. Pet. App. 17a. The beneficiaries of the BH Trust identified in the trust instrument are two so-called *fondos fiduciarios* ("fiduciary funds") called the Assistance Fund and the Infrastructure Fund for which the co-petitioner Banco de la Nación ("BNA") serves as nominal "trustee." *Id.* at 17a-18a. The Infrastructure Fund was established by the government of Argentina to "make[] loans to the federal and provincial governments to support infrastructure development." *Id.* at 19a. The sole purpose of the Assistance Fund is to hold the Argentine state's "Class A" shares in BH, and to capitalize the Infrastructure Fund as directed by Argentina's Minister of Finance. *Id.* at 18a–19a. The district court's attachment order and restraining orders were directed at *both* the corpus of the BH Trust and the beneficial interests in the BH Trust held by the Assistance Fund and the Infrastructure Fund. *Id.* at 15a.

On August 18, 2009, the district court confirmed those orders under Federal Rules of Civil Procedure 64 and 69, which require federal courts to apply the forum state's attachment and execution procedures.

Pet. App. 15a. The district court concluded that respondents had satisfied the New York law requirements for attachment and restraint against *both* the corpus of the BH Trust and the beneficial interests held in the trust. One of those requirements is that the judgment debtor—here, Argentina—hold an interest in the restrained property. N.Y. C.P.L.R. §§ 5222(b), 6214(b). The district court found that because the Assistance Fund and the Infrastructure Fund "are essentially used as discretionary funds of the Republic, and . . . the Republic ha a right to use the assets of the Funds as it wishes," they are "part of the Republic and, by extension, the Republic has the same legal rights as the Funds themselves." *Id.* at 23a. And because the Assistance Fund and the Infrastructure Fund "have a right to distributions from the BH Trust, and ultimately to the corpus of the Trust," the court held, "the Republic has these rights as well." *Id.* at 23a-24a.

The district further held that the restrained assets were not shielded by immunity doctrines set forth in the FSIA and this Court's decision in *First National City Bank v. Banco Para el Comercio Exterior de Cuba ("Bancec")*, 462 U.S. 611 (1983). Pet. App. 29a-31a.

2. In an unpublished order, the Second Circuit affirmed the district court's confirmation of the attachment orders and restraining notices. Pet. App. 5a. The court held that the Republic and BNA had "not pointed to anything in the record that leads us to conclude that the district court abused its discretion when it found that the evidence" demonstrated that the Assistance Fund and Infrastructure Fund "are 'part of the Republic.'" *Id.* at 7a.

Argentina and BNA also argued that, aside from whether the Assistance Fund and the Infrastructure Fund were valid trusts, "the BH Trust is a valid

trust under Argentine law." Pet. App. 7a. For that reason, they said, the BH Trust's corpus could legally belong only to "the trust itself, not to the Republic" and so could not be seized to satisfy Argentina's outstanding judgments. *Id.*

The Second Circuit rejected that argument. The court first noted, citing its prior precedent, that because this case arises under the FSIA, New York choice-of-law rules govern whether the court would look to Argentine or New York trust law to determine the validity of the BH Trust. *Id.* (citing *Barkanic v. Gen. Admin. of Civil Aviation of the People's Republic of China*, 923 F.2d 957, 959 (2d Cir. 1991)). The court then explained that "[u]nder New York law, '[t]he first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved." Pet. App. 8a (quoting *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 85 (2d Cir. 2002)). "If a conflict is identified, New York requires application of an 'interests analysis' in which 'the law of the jurisdiction having the greatest interest in the litigation [is] applied and . . . the facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict.'" *Id.* (quoting *Karaha Bodas*, 313 F.2d at 85). "Finally," the court stated, "'New York law requires the court to honor the parties' choice [of law provision] insofar as matters of substance are concerned, so long as fundamental policies of New York law are not thereby violated.'" *Id.* (quoting *Woodling v. Garrett Corp.*, 813 F.2d 543, 551 (2d Cir. 1987); alteration in original).

The court then applied that choice-of-law rule to the facts of the case. The BH Trust Agreement contains a provision specifying that it is to be construed under Argentine law. Petitioners contended that

this provision amounted to a broad designation of Argentine law to govern all disputes related to the BH Trust Agreement—even where the claimant was not a party to the Agreement. The respondents did not concede that this provision was ever intended to govern their motion to confirm the attachment and restraining orders; however, they did concede that the BH trust would be considered a valid trust under Argentine law.

Without passing on the scope of that choice-of-law provision in the BH Trust Agreement, the Second Circuit examined New York trust law to determine whether "enforcing the trust agreement would violate 'fundamental policies' of New York law." Pet. App. 8a. Relying on state-court precedent, the Second Circuit concluded that "'[i]t is against public policy to permit the settlor-beneficiary to tie up her own property in such a way that she can still enjoy it but can prevent her creditors from reaching it.'" *Id.* (quoting *Vanderbilt Credit Corp. v. Chase Manhattan Bank, NA*, 473 N.Y.S.2d 242, 246 (N.Y. App. Div. 1984); alteration in original). Because the district court had concluded that Argentina had the legal authority to direct the trustee of the BH Trust to liquidate the assets of the BH Trust, the Second Circuit found that "the assets that comprise the corpus of the BH Trust are controlled directly by the Republic." *Id.* at 9a. Thus, the Court held, "[b]ecause the Republic has the current authority to direct disposition of the corpus of the BH Trust for its own benefit, we believe that, for reasons of long-standing public policy, New York law would not recognize the BH Trust as a valid trust entitled to protection against creditors." *Id.*

The Second Circuit also affirmed the district court's conclusions that under New York law, Argentine law, and federal common law, the property of Assistance Fund and the Infrastructure Fund is

property of Argentina itself and that neither the FSIA nor *Bancec*, 462 U.S. 111 (1984), shielded the assets from seizure. *Id.* 9a-13a.

## REASONS FOR DENYING THE PETITION

The summary order of the Second Circuit does not warrant this Court's review. Although petitioners now claim that the Second Circuit should have applied the choice-of-law rules of the Second Restatement rather than New York law, they never raised that argument before the Second Circuit. There was a good reason for their omission: New York courts apply precisely the same rule as the Second Restatement for choice-of-law clauses, as a number of federal and state decisions have held. Indeed, the very case that the panel below cited for New York law itself relied on the Second Restatement. Thus, regardless of how this Court answers the question presented, it would be compelled to affirm the Second Circuit, rendering this case an inappropriate vehicle for consideration of that issue. In addition, because the district court separately restrained all beneficial interests in the BH Trust—an order not challenged now by petitioners—even a reversal by this Court would not change the practical outcome of this case: Respondents would still be entitled to the assets held in the BH Trust.

Two other considerations counsel strongly against a grant of certiorari. First, even if petitioners are correct that federal common law (i.e., the Second Restatement) supplies the choice-of-law rules in FSIA cases as a general matter, that would not be true in the unique context of this case: Because under Federal Rules of Civil Procedure 64 and 69 the forum state's law governs ancillary remedies even in cases arising under the FSIA, the district court would have been required to apply New York choice-of-law rules regardless of whether state choice-of-law

rules generally apply in FSIA cases. It is therefore highly likely that if this Court were to grant certiorari, it would not be able to reach the question presented. Finally, because the Second Restatement is the dominant approach to conflict issues in U.S. jurisdictions (as it is in New York), the question presented has little more than theoretical significance.

## I. PETITIONERS DID NOT PRESERVE THE QUESTION PRESENTED BELOW.

Petitioners did not argue below that it was improper for the Second Circuit to apply New York choice-of-law rules. That failure to preserve the question presented is fatal to their petition, because this Court "ordinarily will not decide questions not raised or litigated in the lower courts," even if they were passed on by the Court of Appeals. *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987) (per curiam) (dismissing writ of certiorari as improvidently granted).

In respondents' Second Circuit brief, they argued with respect to the validity of the BH Trust that "[u]nder New York's choice-of-law rules, th[e] compelling policy [of invalidating self-settled trusts]—combined with New York's many significant contacts with [the] matter . . . —requires application of New York law to the extent it conflicts with Argentine law." Appellees' C.A. Br. 50-51. In reply, neither Argentina nor BNA disputed that New York choice-of-law rules govern; nor did either contend that the Second Restatement should control instead. To the contrary, BNA argued that respondents were incorrect that "under a New York choice of law analysis, New York's public policy against self-settled trusts requires the application of New York law to determine the validity of the BH Trust," because, in its view, the "BH Trust is not a self-settled trust." BNA C.A. Reply Br. 7-8. And in adopting BNA's argu-

ments, Argentina stated that "New York's choice of law rules would call for the application of Argentine law." Argentina C.A. Reply Br. 5.

Petitioners did not preserve any argument, even in a footnote, that the Second Circuit should reconsider its position on the question presented. Nor did petitioners file a petition for rehearing *en banc* on the issue. In fact, nowhere in their four briefs filed with the Second Circuit did petitioners cite either the Second Restatement or the Ninth Circuit precedent on which they now rely. Although petitioners state that they "asserted that Argentine law should apply to the BH Trust" (Pet'n at 15), that was Argentine *substantive* law, which they argued should apply because that is what *New York* choice-of-law rules prescribed.

This Court ordinarily will not consider an issue not raised by the petitioner below. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645–46 (1992). That prudential rule "help[s] to maintain the integrity of the process of certiorari." *Id.* at 646. The rule has special force here, because in the Second Circuit the assumption of both parties that New York law governs is "'sufficient to establish choice of law.'" *Krumme v. WestPoint Stevens Inc.*, 238 F.3d 133, 138 (2d Cir. 2000) (quoting *Tehran-Berkeley Civil and Envtl. Eng'rs v. Tippetts-Abbett-McCarthy-Stratton*, 888 F.2d 239, 242 (2d Cir. 1989). Moreover, the Second Circuit addressed the question presented in only one sentence, a quotation of its own precedent (Pet. App. 7a), and did not have the opportunity to consider the position of the Ninth Circuit because petitioners never alerted the panel to that case law. The petition accordingly should be denied.

## II. This Case Is An Inadequate Vehicle Because Resolution Of The Question Presented In Petitioners' Favor Would Not Change The Outcome.

This case is not an appropriate vehicle to answer the question presented because no answer to that question could change the outcome. Because the relevant choice-of-law rule from the Second Restatement is identical to the New York law rule applied by the Second Circuit—indeed, New York state and federal courts have repeatedly cited the relevant section of the Second Restatement as encapsulating New York law—this Court would be required to affirm the judgment below regardless of how it resolved the question presented. And practically speaking, even if this Court were to reverse the Second Circuit's judgment, the result in this case would not change, because petitioners have not challenged a separate ruling by the Second Circuit that permitted respondents to restrain the beneficial interests in the BH Trust. As a consequence, regardless of how this Court rules, when the assets in the trust are liquidated at the execution phase, the proceeds will be distributed to the respondents.

### A. The Second Restatement Sets Forth Precisely The Same Rule That The Second Circuit Applied.

There is an obvious reason that petitioners did not preserve their new argument that the district court should have applied the choice-of-law rules of the Second Restatement rather than New York: It is well established that "[i]n cases arising from contracts that include a choice-of-law clause, New York courts follow the test set forth in the Restatement (Second) of Conflicts of Laws." *Beatie & Osborn LLP v. Patriot Scientific Corp.*, 431 F. Supp. 2d 367, 378 (S.D.N.Y. 2006). In other words, the Second Re-

statement sets forth precisely the same test that the Second Circuit applied below. For that reason, this Court would have to affirm the judgment below regardless of how it answered the question presented.

The Second Circuit applied the rule that a court must "'honor the parties' choice [of law provision] insofar as matters of substance are concerned, so long as fundamental policies of New York law are not thereby violated.'" Pet. App. 8a (quoting *Woodling*, 813 F.2d at 551). Because the court concluded that the BH Trust violated New York's policy against self-settled trusts—a fact-bound application of state law not challenged by petitioners now—it concluded that "New York law would not recognize the BH Trust as a valid trust" even if the choice-of-law provision had designated Argentine law to apply to the respondents' motion to confirm the attachment and restraining orders. Pet. App. 8a-9a.

Section 187 of the Second Restatement sets forth the same rule that the Second Circuit applied:

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied . . . unless . . . application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Restatement (Second) of Conflict of Laws § 187(2) (1969). In fact, the Second Circuit precedent that the panel below relied on for its holding cited Section 187 as the basis for the New York rule. *See Woodling*, 813 F.2d at 551. Other New York federal courts have quoted Section 187 nearly verbatim as the

standard under New York law. *See, e.g.*, *Estee Lauder Cos. Inc. v. Batra*, 430 F. Supp. 2d 158, 170 (S.D.N.Y. 2006) ("[U]nder New York law . . . a contract's designation of the law that is to govern disputes arising from the contract . . . is determinative [unless] . . . application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state.") (internal quotation marks omitted).[1] And New York state appellate courts, including the Court of Appeals of New York, have cited Section 187 of the Second Restatement as the New York standard for New York's public-policy exception to choice-of-law provisions. *See Welsbach Elec. Corp. v. MasTec N. Am., Inc.*, 859 N.E.2d 498, 500-01 (N.Y. 2006); *In re Mark Frankel*, ___ N.Y.S.2d ___, 2010 WL 4909624, at *3 (N.Y. App. Div. Nov. 30, 2010); *Marine Midland Bank, N.A. v. United Mo. Bank, N.A.*, 643 N.Y.S.2d 528, 531 (N.Y. App. Div. 1996). *See generally* N.Y. Jur. § 33.

There is therefore no difference between the rule that the Second Circuit applied below and the standard of the Second Restatement that petitioners claim would be applied in the Ninth Circuit. For that reason, this Court's answer to the question presented could not possibly lead it to reverse the Second Circuit.

In an attempt to manufacture a conflict between New York law and the Second Restatement, petitioners cite a different section of the Restatement—Section 268—than the one embodying the rule applied by the Second Circuit—Section 187. Petition-

---

[1] *See also Beatie*, 431 F. Supp. 2d at 378; *Radioactive, J.V. v. Manson*, 153 F. Supp. 2d 462, 469 (S.D.N.Y. 2001) ("New York courts follow the test laid out in the Restatement (Second) of Conflicts of Laws § 187.").

ers argue that "the Republic would have prevailed" under Section 268. Pet'n at 15; *see also id.* at 3 ("[H]ad the court of appeals applied this federal choice of law rule and hence Argentine substantive law . . . ."). Section 268, however, addresses what law governs the *construction* of the terms of a trust agreement—a question not at issue in this case. *See* Restatement (Second) of Conflict of Laws § 268(1). It is Section 187 that generally governs what is at issue here—"contractual rights and duties" relating to a trust agreement. *Id.* § 187(2); *see also id.* § 187 ills. 4, 5 (making clear that Section 187 applies to trust instruments). That is no doubt why neither the Second Circuit nor petitioners themselves cited Section 268 below.[2] And in any event, the Restatement's rules governing construction of trust instruments contain a public-policy exception materially similar to the one applied by the Second Circuit, which would have led to the same result in this case even if the Second Circuit had applied Section 268. *See id.* § 270(a).

---

[2] Contrary to petitioners' suggestion, New York law does not differ from Section 268; the hornbook New York law rule for choice-of-law clauses in trust instruments comports with Section 268. *See Shannon v. Irving Trust Co.*, 9 N.E.2d 792, 794 (N.Y. 1937) ("The instrument should be construed and a determination of its validity made according to the law chosen by the settlor unless so to do is contrary to the public policy of this state."). In fact, a New York federal court sitting in diversity has applied Section 268 when necessary to resolve the issues presented by that case. *See Clalit Health Servs. v. Israel Humanitarian Found.*, 385 F. Supp. 2d 392, 398 n.9 (S.D.N.Y. 2005).

### B. Vacating The Restraint On The Trust Corpus Would Have No Practical Impact.

Even if this Court were to reverse the Second Circuit's holding affirming the district court's order insofar as it confirmed the attachment and restraint of the corpus of the BH Trust, it would have no real impact on this case. That is because the district court, entirely apart from restraining the *corpus* of the BH Trust, also restrained the *beneficial interests* in the BH Trust held by the Assistance Fund and the Infrastructure Fund (which are ultimately controlled by Argentina). *See* Pet. App. 23a-24a. And as the district court explained, restraint of the beneficial interests in the trust is essentially redundant with restraint of the trust corpus: "Since it is undisputed that the Assistance and Infrastructure Funds have a right to distributions from the BH trust, *and ultimately to the corpus of the Trust*, the Republic has these rights as well." Pet. App. 23a-24a (emphasis added).

The Second Circuit affirmed the district court's holding with respect to the beneficial interests in the BH Trust (Pet. App. at 9a-10a), and petitioners do not challenge it before this Court.[3] Although petitioners claim that the procedural mechanism for executing against the beneficial interests would differ from the mechanism for executing against the trust corpus (Pet'n 12 n.9), in either event respondents would ultimately be entitled to the proceeds from liquidation of the trust's assets. It would be a poor

---

[3] Because the district court held that the Assistance Fund and the Infrastructure Fund were invalid trusts under *either* Argentine or New York law, any challenge to that holding would amount only to a factbound challenge to the application of state and foreign law.

use of this Court's resources to prolong this litigation when there is no possibility that the Court's holding would affect the final disposition of those assets.

## III. The Question Presented Is Not Squarely Implicated Because The Federal Rules Of Civil Procedure Require Application Of New York Law In The Unique Context Of This Case.

Even if this case did not present the fatal vehicular problems discussed above, there would be an additional barrier to this Court's review of the question presented: Because the Second Circuit's choice-of-law analysis was conducted in the context of prejudgment attachments and postjudgment restraints under Federal Rules of Civil Procedure 64 and 69 (*see* Pet. App. 5a-6a), New York law would apply here regardless of whether courts must look to federal common law generally for actions arising under the FSIA.

Rule 69 provides that "[t]he procedure on execution . . . must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies." Fed. R. Civ. P. 69(a)(1). Rule 64 likewise states that prejudgment remedies such as "attachment" are available to the extent permitted "under the law of the state where the court is located," unless "a federal statute governs." Fed. R. Civ. P. 64. Because the FSIA does not itself provide for attachment and execution, it is well-settled that in actions arising under the FSIA, courts apply the forum state's law for those ancillary remedies. *See, e.g., Walker Int'l Holdings, Ltd. v. Republic of Congo*, 415 F.3d 413, 416 (5th Cir. 2005) ("Because the FSIA does not supply a cause of action, the rule of decision applied to the . . . the underlying gar-

nishment proceeding[] is that of the State of Texas under Fed.R.Civ.P. 69(a)."); *Karaha Bodas*, 313 F.3d at 83 ("In attachment actions involving foreign states, federal courts . . . apply Fed.R.Civ.P. 69(a), which requires the application of local state procedures."). Accordingly, the Second Circuit held in this case that "the district court properly employed the procedures provided under New York law"—a holding that petitioners did not dispute below and do not challenge here. Pet. App. 5a-6a.

Because attachment and execution are governed by the law of the forum state, questions about the scope and application of those remedies, such as whether the assets sought to be restrained belong to a valid trust (Pet. App. 7a), are answered by state law, not federal law. *See, e.g.*, *Schreiber v. Kellogg*, 50 F.3d 264, 267 (3d Cir. 1995) ("Under Rule 69(a) of the Federal Rules of Civil Procedure . . . we look to Pennsylvania law to determine whether Schreiber may execute on Kellogg's interest in the Wanamaker trust."). That includes the threshold application of the forum state's choice-of-law rules. For example, in *Gagan v. Monroe*, 269 F.3d 871 (7th Cir. 2001), the Seventh Circuit, in a Rule 69 proceeding, applied the forum state's choice-of-law rules to ascertain which state's property law determined whether the property at issue was exempt from execution. *Id.* at 873-74.

The procedural posture of this case would thus frustrate this Court's ability to reach the question presented, which inquires of the choice-of-law rule *generally* in cases arising under the FSIA, not *specifically* of remedial proceedings conducted under Rule 64 or Rule 69. And tellingly, none of the Ninth Circuit precedents on which petitioners rely arose in the Rule 64 or Rule 69 context of this case. *See*

*Chiudian v. Philippine Nat'l Bank*, 976 F.2d 561 (9th Cir. 1992); *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777 (9th Cir. 1991); *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989). Petitioners' assertions that this case "squarely presents" a "direct conflict" (Pet'n at 13) thus seem grossly overstated if not flatly incorrect. And it further seems that if this Court grants certiorari, it would ultimately rest its holding on Rules 64 and 69 and never reach the question presented.[4]

## IV. PETITIONERS VASTLY OVERSTATE THE IMPORTANCE OF THE QUESTION PRESENTED.

Petitioners exaggerate the importance of the question presented when they fret that "foreign states subject to jurisdiction in U.S. courts under the FSIA . . . face inconsistent standards on the basic issue of what choice of law rule controls." Pet'n at 14. It is rarely true that "inconsistent standards" govern the choice-of-law question in cases arising under the FSIA, because the majority of states apply the Second Restatement or a similar approach. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2008: Twenty-Second Annual Survey*, 57 Am. J. Comp. L. 269, 279 (2009). In addition, most states, including the important international-

[4] Respondents had no occasion to highlight the special context of this case below because petitioners did not dispute that New York choice-of-law rules applied. But even if petitioners' failure to assert an argument could be ascribed to respondents, there could be no forfeiture in any event. Respondents are entitled in this Court to "make any argument in support of [their] claim; parties are not limited to the precise arguments they made below." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (internal quotation marks omitted).

business jurisdiction of New York, apply the Restatement section at issue here, Section 187, governing choice-of-law clauses. *See* Michel A. Jaccard, *Securing Copyright in Transnational Cyberspace*, 35 Colum. J. Transnat'l L. 619, 654 (1997). If this question is as important as petitioners suggest, this Court should await a case that actually presents a conflict between the Second Restatement and a state's choice-of-law rules, should one ever arise.

Moreover, even if the Second Restatement tended to diverge from state law, the uniformity that petitioners claim that their approach would bring to FSIA cases is illusory. Petitioners argue that "what constitutes 'property in the United States' under the FSIA should be determined consistently." Pet'n at 16. But even if courts applied the same *choice-of-law* rule in every case, diverse state *substantive* law would still mean that a foreign nation "could face a multiplicity of results regarding what constitutes 'property in the United States.'" *Id.* That lack of uniformity results from the combination of our federal system and Congress's choice that, absent FSIA immunity, a "foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. And petitioners' complaint that the law governing "attachment and execution under the FSIA . . . cannot be left to the vagaries of state choice of law rules" (Pet'n at 15-16) rings especially hollow in light of Congress's express choice in Federal Rules of Civil Procedure 64 and 69 to direct federal courts to apply state law to those ancillary remedies.

Further, the asserted split between the Ninth Circuit and all other circuits to consider the question is likely to be self-correcting. As the petition for certiorari makes clear, the Sixth Circuit and the D.C.

Circuit first took a position on the question presented only in 2009. *See* Pet'n at 13 (citing *Oveissi v. Islamic Republic of Iran*, 573 F.3d 835 (D.C. Cir. 2009), and *O'Bryan v. Holy See*, 556 F.3d 361 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 361 (2009)). That fact not only demonstrates the infrequency with which parties dispute which jurisdiction's law will apply in an FSIA case, but also strongly suggests that as additional circuits adopt the Second Circuit's rule, the Ninth Circuit may reconsider its outlier precedent *en banc*.[5]

---

[5] Petitioners hint, but do not expressly assert, that the decision below conflicts with this Court's holding in *Bancec*, 462 U.S. 611 (1983). Pet'n at 16-17. That insinuation is incorrect. The footnote that the petitioners cite explained that "where state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances." *Id.* at 622 n.11. Only where the legal question is unique to foreign states—such as "the attribution of liability among entities of a foreign state"—do federal common law rules apply. Here, the question the Second Circuit answered was whether a choice-of-law provision in a trust instrument must be disregarded—a question that is not unique to foreign nations, as petitioners implicitly concede through their reliance on the generally applicable principles of the Second Restatement.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

DAVID W. RIVKIN
JOHN B. MISSING
SUZANNE M. GROSSO
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000

*Counsel for Respondent EM Ltd.*

ROBERT A. COHEN
*Counsel of Record*
DENNIS H. HRANITZKY
DECHERT LLP
1095 Avenue of the Americas
New York, NY 10036-6797
(215) 963-5000
robert.cohen@dechert.com

*Counsel for Respondent NML Capital, Ltd.*

January 10, 2011

180 (3)

No. 10-572

Supreme Court, U.S.
FILED
JAN 20 2011
OFFICE OF THE CLERK

In the

# Supreme Court of the United States

THE REPUBLIC OF ARGENTINA,
BANCO DE LA NACIÓN ARGENTINA,

*Petitioners,*

*v.*

EM LTD., NML CAPITAL, LTD.,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## REPLY BRIEF FOR PETITIONERS

MARK S. SULLIVAN
MARIO DIAZ-CRUZ, III
LAURA M. LESTRADE
DORSEY & WHITNEY LLP
250 Park Avenue
New York, New York 10177
(212) 415-9200
sullivan.mark@dorsey.com
diaz.cruz.mario@dorsey.com
lestrade.laura@dorsey.com

*Attorneys for Petitioner Banco de la Nación Argentina*

JONATHAN I. BLACKMAN
*Counsel of Record*
CARMINE D. BOCCUZZI
CHRISTOPHER P. MOORE
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2000
jblackman@cgsh.com
cboccuzzi@cgsh.com
cmoore@cgsh.com

*Attorneys for Petitioner The Republic of Argentina*

January 20, 2011

## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| I. THERE IS A CLEAR CONFLICT IN THE COURTS OF APPEALS AS TO WHETHER THE FSIA REQUIRES APPLICATION OF FEDERAL COMMON LAW OR FORUM STATE CHOICE OF LAW RULES, AND THAT CONFLICT IS DIRECTLY RELEVANT TO THE OUTCOME IN THIS CASE. | 2 |
| II. RESPONDENTS' POSITED VEHICLE PROBLEMS ARE ILLUSORY. | 8 |
| CONCLUSION | 12 |

## TABLE OF AUTHORITIES


| Cases: | *Page(s)* |
|---|---|
| *Barkanic v. Gen. Admin. of Civil Aviation of the People's Republic of China*, 923 F.2d 957 (2d Cir. 1991) | 3 |
| *City of Springfield v. Kibbe*, 480 U.S. 257 (1987) | 6-7 |
| *Dumont v. Saskatchewan Gov't Ins. (SGI)*, 258 F.3d 880 (8th Cir. 2001) | 2 |
| *Estee Lauder Cos. Inc. v. Batra*, 430 F. Supp. 2d 158 (S.D.N.Y. 2006) | 9 |
| *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) | 5, 7 |
| *Gagan v. Monroe*, 269 F.3d 871 (7th Cir. 2001) | 11 |
| *In re Aircrash Disaster Near Roselawn, Ind. on Oct. 31, 1994*, 926 F. Supp. 736 (N.D. Ill. 1996) | 2-3 |
| *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995) | 6, 7 |
| *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1 (2d Cir. 1996) | 2-3 |
| *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777 (9th Cir. 1991) | 6 |

*Page(s)*

*Schreiber v. Kellogg*,
50 F.3d 264 (3d Cir. 1995) ..... 11

*Schultz v. Boy Scouts of Am., Inc.*,
480 N.E.2d 679 (N.Y. 1985) ..... 3

*Shannon v. Irving Trust Co.*,
9 N.E.2d 792 (N.Y. 1937) ..... 3, 9

*Taylor v. Freeland & Kronz*,
503 U.S. 638 (1992) ..... 7

*United States v. Williams*,
504 U.S. 36 (1992) ..... 5, 7

*Verlinden B.V. v. Cent. Bank of Nigeria*,
461 U.S. 480, 497 (1983) ..... 10

*Virginia Bankshares, Inc. v. Sandberg*,
501 U.S. 1083 (1991) ..... 7

*Walker Int'l Holdings, Ltd. v. Republic of Congo*,
415 F.3d 413 (5th Cir. 2005) ..... 11

*Woodling v. Garrett Corp.*,
813 F.2d 543 (2d Cir. 1987) ..... 3, 8-9

*Yee v. City of Escondido*,
503 U.S. 519 (1992) ..... 6

*Page(s)*

**Rules and Statutes**

28 U.S.C. § 1610 ..... 10

28 U.S.C. § 1610(a) ..... 9

Fed. R. Civ. P. 64(a) ..... 10

Fed. R. Civ. P. 69(a)(1) ..... 10

**Other Authorities**

Restatement (Second) of Conflict of Laws § 187(2)(b) ..... 8

Restatement (Second) of Conflict of Laws § 268(1) ..... 3-4

Restatement (Second) of Conflict of Laws § 270(a) ..... 4

14A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3662 (3d ed. 1998) ..... 2

## REPLY BRIEF FOR PETITIONERS

Respondents do not dispute the existence of the longstanding circuit split among the Second, Sixth, D.C. and Ninth Circuits on whether, in cases under the Foreign Sovereign Immunities Act ("FSIA"), a federal court should apply federal common law choice of law rules or those of the state in which the court sits. The division in the courts of appeals on this important question of federal law calls for this Court's review. The impact of this circuit split is exemplified by the court of appeals decision here, which applied New York choice of law rules (which incorporate New York's view of public policy) to disregard a trust governed by Argentine law and settled in Argentina, by Argentine parties, in 1999 – *years* before the Republic's historic economic crisis in 2001, and *years* before the respondent hedge funds sued the Republic of Argentina on defaulted debt. The petition thus raises compelling issues concerning the protections to be afforded to foreign states from execution or attachment in U.S. courts and whether those protections, as embodied in the FSIA, should be trumped by local "policy" concerns.

Respondents' assertion that the petitioners did not preserve the choice of law question is wrong. Petitioners argued at all times below that *Argentine* law – not New York law – should control the case and determine the validity of the Argentine BH Trust, which is precisely what *would* have happened if the court of appeals had applied a federal common law analysis as opposed to state choice of law rules. The choice of law question was also

plainly addressed by the court of appeals when it held, relying on prior Second Circuit precedent, that the FSIA requires courts to apply the choice of law provisions of the forum state. Nor are respondents correct in asserting that the question presented is irrelevant to the outcome in this case. The opposite is true: had the court of appeals applied federal common law instead of the forum choice of law rule, it could not have invalidated the Argentine BH Trust for the benefit of the respondent judgment creditors.

## I. THERE IS A CLEAR CONFLICT IN THE COURTS OF APPEALS AS TO WHETHER THE FSIA REQUIRES APPLICATION OF FEDERAL COMMON LAW OR FORUM STATE CHOICE OF LAW RULES, AND THAT CONFLICT IS DIRECTLY RELEVANT TO THE OUTCOME IN THIS CASE.

Respondents concede, as they must, that there is a circuit split on the issue of which choice of law rules – federal common law or forum state – apply in FSIA cases. Opp. 18-19; *see also, e.g., Dumont v. Saskatchewan Gov't Ins. (SGI)*, 258 F.3d 880, 886 (8th Cir. 2001) ("In a FSIA case, 'there is no clear understanding as to whether the forum state's choice-of-law rules should apply or whether federal common law should govern.'" (quoting 14A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3662 (3d ed. 1998))); *In re Aircrash Disaster Near Roselawn, Ind. on Oct. 31, 1994*, 926 F. Supp. 736, 739 (N.D. Ill. 1996) ("In FSIA actions,

courts are divided as to whether the forum state's choice of law rules should apply or whether federal common law should govern."); *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 12 (2d Cir. 1996) (same); additional cases at Pet. 13-14.

The New York choice of law rule – which the Second Circuit applies in FSIA cases, *see Barkanic v. Gen. Admin. of Civil Aviation of the People's Republic of China*, 923 F.2d 957, 959 (2d Cir. 1991) -- requires application of the governing law specified in the trust (here, Argentine law) unless application of such law would violate *New York* public policy. *See Shannon v. Irving Trust Co.*, 9 N.E.2d 792, 794 (N.Y. 1937) ("a determination of [a trust's] validity [should be] made according to the law chosen by the settlor unless so to do is contrary to the public policy of *this state*") (emphasis added); *see also Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679, 687 (N.Y. 1985) ("The public policy doctrine is an exception to implementing an otherwise applicable choice of law in which the forum refuses to apply a portion of foreign law because it is contrary or repugnant to *its State's* own public policy.") (emphasis added); *Woodling v. Garrett Corp.*, 813 F.2d 543, 551 (2d Cir. 1987) (explaining that New York's choice of law principles require application of designated choice of law unless doing so would violate "fundamental policies of *New York* law") (emphasis added).

By contrast, federal common law requires application of the law designated in the trust, *see* Restatement (Second) of Conflict of Laws § 268(1)

(stating that a trust instrument is "construed in accordance with the rules of construction of the state designated for this purpose in the instrument"), and when it permits public policy to trump that law, applies the policy of the jurisdiction with the most significant relationship to the trust. *Id.* § 270(a) (providing that designated law must be applied to issue of trust validity unless doing so would violate "a strong public policy of *the state with which, as to the matter at issue, the trust has its most significant relationship*") (emphasis added) (cited at Opp. 13). Whereas New York courts are required to analyze whether application of the designated law in the trust instrument violates *New York* public policy, courts applying federal common law must adhere to the law specified in the trust unless the state with the "most significant relationship" with the trust has a "strong" public policy counseling against application of the designated law. This is a very different analysis than mechanically applying the *forum state's* public policy views, and one with profound implications for foreign sovereigns.

The New York choice of law rule is thus different from the federal common law rule in a key respect, and that difference bears directly on the outcome in this case. When the court of appeals here applied the New York rule, it had to consider *New York* policy, something it would not have done under the federal rule *unless* it had first concluded that *New York* has the "most significant relationship" with the Argentine BH Trust. It could not have so concluded, because there is no serious question that

the BH Trust has its "most significant relationship" with Argentina, as opposed to New York. The trust was settled in Argentina and created under Argentine law to further public works development in Argentina; the trustor, trustee, and beneficiaries of the trust are all Argentine. Had the court of appeals applied federal common law choice of law rules, it would therefore not have been permitted to rely on *New York* state policy to invalidate a purely Argentine trust instrument. *See* Pet. App. 8a (court of appeals holding that, "despite the choice of law provision in the BH Trust agreement purporting to establish a trust pursuant to Argentine law, New York law would not recognize it as such since enforcing the trust agreement would violate 'fundamental policies' of New York law"). It is difficult to imagine a clearer case of a court applying a "parochial state interpretation" in a matter involving foreign sovereign relations. *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983) ("*Bancec*") (citation and internal quotation marks omitted).

Respondents are wrong to argue that petitioners are barred from presenting the choice of law question on petition for certiorari. Opp. 8-9. This Court "precludes a grant of certiorari only when the question presented was not pressed *or* passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (emphasis added) (citation and internal quotation marks omitted). This is not the case here.

*First*, respondents admit that petitioners have at all times argued that Argentine law, not New York

law, governed the validity of this Argentine trust. Opp. 9. The choice of law issue is "not a new claim, but a new argument to support what has been [petitioners'] consistent claim." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1996); *see also Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below. . . . A litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below."); *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782-83 (9th Cir. 1991) (ruling on the forum state versus federal common law choice of law question though it had not been explicitly argued in the district court because the "relevant issue is whose law applies, and [appellant] itself raised that. The question of whose rules apply in *deciding* whose law applies is predicate to the ultimate decision," and thus the court "must evaluate whatever steps are necessary to decide [that] issue").

*Second*, the court of appeals quite clearly "passed upon" the choice of law issue by concluding that, under the FSIA, the forum state's choice of law provisions should apply, and by citing Second Circuit precedent explicitly applying forum state choice of law provisions over federal common law rules in FSIA cases. Pet. App. 7a-8a. Respondents' invocation of *City of Springfield v. Kibbe*, 480 U.S. 257

(1987), for the proposition that the Court will ordinarily decline to decide questions not raised or litigated below, "even if they were passed on by the Court of Appeals," Opp. 8, is inapposite, because in *Kibbe* the relevant question had not been presented in the petition for certiorari and was not raised by either party until the merits briefing before the Court. *Kibbe*, 480 U.S. at 260 ("the petition did not explicitly present the negligence question"); *accord Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) (argument raised for first time in opening merits brief). And in multiple cases since *Kibbe*, the Court has made clear that certiorari is precluded only where the question presented was not pressed *or* passed upon below. *Williams*, 504 U.S. at 41 ("That this rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon, is illustrated by some of our more recent dispositions."); *see also Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991); *Lebron*, 513 U.S. at 379.

The clash of opinions concerning which conflict of laws rules apply in FSIA cases is long overdue for resolution. *See Bancec*, 462 U.S. at 622 n.11 (recognizing that, "[w]hen it enacted the FSIA, Congress expressly acknowledged the importance of developing a uniform body of law concerning the amenability of a foreign sovereign to suit in United States courts."). Respondents' speculation that the circuit split will "self-correct" itself at some unidentified future point via an *en banc* Ninth Circuit ruling overturning decades of precedent, Opp. 18-19,

promises no resolution of the split and only underscores the importance of review by this Court.

## II. RESPONDENTS' POSITED VEHICLE PROBLEMS ARE ILLUSORY.

While recognizing the circuit conflict on whether federal common law or state choice of law rules apply in FSIA cases, respondents avoid its resolution by invoking a host of specious "vehicular problems." This attempt fails.

*First*, this case is an appropriate vehicle for resolving the circuit split because the applicable federal choice of law rules plainly diverge from the New York rules applied below. Respondents try to downplay the difference between the New York state and federal common law approaches by arguing that New York follows the same choice of law rule here as that embodied in Section 187 of the Restatement. *See* Opp. 10-13; Restatement (Second) of Conflict of Laws § 187(2)(b) (stating that designated choice of law applies unless its application "would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state"). This is wrong, as demonstrated by the ruling of the court of appeals, in which the court applied New York law to override the designated choice of law in the BH Trust Agreement and did *not* cite Section 187 of the Restatement. *See* Pet. App. 8a (holding that "New York law requires the court to honor the parties' choice [of law provision] insofar as matters of substance are concerned, '*so long as fundamental policies of New*

*York law are not thereby violated*'" (emphasis added) (quoting *Woodling*, 813 F.2d at 551)). Although New York courts sometimes cite Section 187 – which applies to validity of *contracts*, not trusts – in contracts cases, *see, e.g.*, *Estee Lauder Cos. Inc. v. Batra*, 430 F. Supp. 2d 158, 170 (S.D.N.Y. 2006) (involving an employment agreement), the New York choice of law rule in the context of *trusts* is that expressed by the New York Court of Appeals in *Shannon* and also applied below: the law specified in the trust instrument should be applied unless to do so would be contrary to the public policy of *New York*. *See Shannon*, 9 N.E.2d at 794.[1]

*Second*, Federal Rules of Civil Procedure 64 and 69 do not require the application of New York choice of law rules and have no bearing on the circuit split over the appropriate choice of law rules to apply in FSIA cases. Respondents argue that "attachment and execution are governed by the law of the forum state" pursuant to Federal Rules 64 and 69, and that "questions about the scope and

[1] Respondents' argument that this Court's review will have no "practical impact" here because the beneficial interests in the BH Trust were also restrained, Opp. 14-15, is likewise meritless. While the district court separately restrained the beneficial interests in the BH Trust, the analysis of both stands or falls together. Once the BH Trust is properly regarded as an Argentine trust, it follows that, like the BH Trust, the beneficial interests held by Argentine entities cannot be deemed to be in the United States, much less used for commercial activity in the United States by the Republic, as required for attachment and execution under the FSIA. 28 U.S.C. § 1610(a).

application of these remedies," which they say includes choice of law issues, therefore "are answered by state law and not federal law." Opp. 16. This is flat-out wrong, and ignores Congress' determination to give the FSIA the central role in governing all issues of substance relating to enforcement of judgments against foreign sovereigns in the United States. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 497 (1983) ("In [enacting the FSIA], Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts, thereby reducing the potential for a multiplicity of conflicting results among the courts of the 50 States.").

The text of both Federal Rules is dispositive. Rule 64 provides that state law remedies for securing satisfaction of a potential judgment, including attachment, are available in a federal action, except that "*a federal statute governs to the extent it applies.*" Fed. R. Civ. P. 64(a) (emphasis added). Rule 69 provides that the procedures employed in an execution proceeding in federal court "must accord with the procedure of the [forum state]," except that, as with Rule 64, "*a federal statute governs to the extent it applies.*" Fed. R. Civ. P. 69(a)(1) (emphasis added). Like other Federal Rules of Civil Procedure, these Rules govern *procedural* issues, but the FSIA controls all matters of substance relating to attachment or execution of assets of a foreign state. *See* 28 U.S.C. § 1610.

The cases respondents cite for their proposition that the admitted circuit split on choice of law somehow does not apply to "remedial" FSIA cases say nothing of the kind. *Schreiber v. Kellogg*, 50 F.3d 264 (3d Cir. 1995), and *Gagan v. Monroe*, 269 F.3d 871 (7th Cir. 2001), involved straightforward enforcement procedures in which no federal statutes were implicated, much less the FSIA; there was no need to choose among competing choice of law principles, unlike in this case. The FSIA case of *Walker International Holdings, Ltd. v. Republic of Congo*, 415 F.3d 413 (5th Cir. 2005), likewise presented no competing choice of law issue. The Fifth Circuit simply held that because "the FSIA does not supply law conflicting with Texas law on the issue of attorneys' fees," it would apply Texas law to that issue, *id.* at 416, just as federal courts often apply state law *as* federal law to fill in lacunae in the latter. It is exactly the question of whether this should be done for choice of law issues in FSIA cases, or whether federal common law principles should be applied to that issue, that this petition presents.

## CONCLUSION

For the reasons set forth above, a writ of certiorari should be granted.

Respectfully submitted,

JONATHAN I. BLACKMAN
*Counsel of Record*
CARMINE D. BOCCUZZI
CHRISTOPHER P. MOORE
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2000
jblackman@cgsh.com
cboccuzzi@cgsh.com
cmoore@cgsh.com

*Attorneys for Petitioner*
*The Republic of Argentina*

MARK S. SULLIVAN
MARIO DIAZ-CRUZ, III
LAURA M. LESTRADE
DORSEY & WHITNEY LLP
250 Park Avenue
New York, New York 10177
(212) 415-9200
sullivan.mark@dorsey.com
diaz.cruz.mario@dorsey.com
lestrade.laura@dorsey.com

*Attorneys for Petitioner*
*Banco de la Nación Argentina*

January 20, 2011